TRANSCRIPT OF RECORD

Supreme Courtoof the United States

OCTOBER TERM, 1948.

No. 40

OKLAHOMA TAX COMMISSION, PETITIONER,

·US

THE TEXAS COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR CERTIORARI FILED MARCH 30, 1948.

CERTIORARI GRANTED APRIL 19, 1948.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 40

OKLAHOMA TAX COMMISSION, PETITIONER,

THE TEXAS COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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IN THE SUPREME COURT OF OKLAHOMA

No. 32270

THE TEXAS COMPANY, a Corporation, Plaintiff in Error,

OKLAHOMA TAX COMMISSION, Defendant in Error

Petition in Error-Filed July 19, 1945 .

The said, The Texas Company, plaintiff in error, complains of the said Oklahoma Tax Commission, defendant in serror, for that the said defendant in error at the January, 1945, term of the District Court of Oklahoma County, State of Oklahoma, and, namely, on the 25th day of January, 1945, recovered a judgment by the consideration of said. District Court (hereinafter referred to as the trial court) against said The Texas Company, plaintiff in error, in a certain action then pending in said trial court wherein said The Texas Company was plaintiff and said Oklahoma Tax Commission was defendant. The original casemade, duly signed, attested and filed, and which is also a certified tran-[fol. 3] script of the record of said case in said trial court, is hereto attached, marked "Exhibit A" for identification and made a part of this Petition in Error. Said The Texas Company, plaintiff in error, avers that there is error in said record and proceedings in this, to-wit:

- 1. Said trial court erred in sustaining the demurrer of the defendant in error to the petition of the plaintiff in error and the amendment thereto filed in said case:
- 2. Said trial court erred in sustaining the demurrer of defendant in error to the First Cause of Action set out and contained in the plaintiff in error's petition and amendment to petition filed in said case.
- 3. Said trial court erred in sustaining the demurrer of defendant in error to the Second Cause of Action set out and contained in plaintiff in error's said petition and amendment to petition filed in said case.

- 4. Said trial court erred in dismissing the plaintiff in error's said petition and said amendment thereto and in rendering judgment in favor of the defendant in error and against plaintiff in error on said petition and the amendment thereto filed in said case.
- 5. Said trial court erred in dismissing the plaintiff in gerror's said petition and said amendment to petition, and in rendering judgment in favor of the defendant in error and [fol. 4] against plaintiff in error on the First Cause of Action set out and contained in said petition and amendment to petition filed in said case.
- 6. Said trial court erred in dismissing the plaintiff in error's said petition and said amendment to petition, and in rendering judgment in favor of the defendant in error and against the plaintiff in error on the Second Cause of Action set out and contained in said petition and amendment to petition filed in said case.

Wherefore, said plaintiff in error prays that said judgment so rendered be reversed, set aside and held for naught, and that judgment be rendered in favor of The Texas Company, Plaintiff in error, and against Oklahoma Tax Commission, defendant in error, overruling said demurrer of said defendant in error to said petition and amendment to petition and to said First and Second Causes of Action respectively; and that plaintiff in error be restored to all rights which it has lost by reason of the rendition of said judgment against it, and for such other relief as the court may deem just.

John R. Ramsey, B. W. Griffith, Ames, Monnet, Hayes & Brown, Attorneys for The Texas Company, Plaintiff in Error. [fols. 5-0]

[Caption omitted]

[fol. 7] IN THE DISTRICT COURT IN AND FOR OKLAHOMA COUNTY, STATE OF OKLAHOMA

No.-106796

THE TEXAS COMPANY, a Corporation, Plaintiff,

VS.

OKLAHOMA TAX COMMISSION, Defendant

Petition-Filed November 30, 4942

Comes now the Texas Company, a corporation, and for its causes of action against the defendant, Oklahoma Tax Commission, alleges and states:

FIRST CAUSE OF ACTION

- 1. That it is now, and was during the months of September, October and November, 1942, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and duly authorized and licensed to do business and doing business in the State of Oklahoma.
- 2. That it is now, and was during all of such time the owner and holder of good, valid and subsisting oil and gas mining leases and the leasehold estates thereby evidenced and created, covering respectively the following described lands, all located in Caddo County, State of Oklahoma, which lands will be described in connection with the said leases and leasehold estates so covering them, that it to say:
- [fol. 8] (a) An oil and gas mining lease dated January 12, 1938 wherein Tsa-ah₅se-zah (Blanche Achilta) is lessor and Quintin Little is lessee, covering the Southwest Quarter of the Southwest Quarter of Section 35, in Township 6 North of Range 12 West of the Indian Meridian, and which lease was duly approved by the Secretary of the Interior of the United States of America on February 15, 1938, and which lease was duly filed for record on the 1st day of August; 1938, in the office of the County Clerk of Caddo County, Oklahoma, and recorded in Book 79 at page 465 of Misc. records of said office. A true and correct photostat copy of said lease is hereto attached, marked "Exhibit A" for

identification and by reference made a part hereof the same as if fully copied herein. The said land covered by said lease will be hereinafter referred to as "said Tract One".

- . (b) An oil and gas mining lease dated January 23, 1937, wherein Oliver, Maynahonah and also W. B. McCown, Superintendent for the Kiowa Indian Agency, for and on behalf of Kosope Maynahonah, a minor, are lessors, and Clyde M. Becker is lessee covering Lots 1 and 2 and the South Half of the Northeast Quarter of Section 2 in Township 5 North of Range 12 West of the Indian Meridian, and which lease was approved by the Secretary of the Interior of the United States of America on March 25, 1937, and which lease was filed for record in the office of said County Clerk on August [fol. 9] 1, 1938, and recorded in Book 79 pf Misc. at page 419 of the records of said office. A true and correct photostat copy of said lease is hereto attached, marked "Exhibit B" for identification and by reference made a part hereof. The lands covered by said lease will be hereinafter referred to as "said Tract Two."
- (c) An oil and gas mining lease dated January 22, 1937, wherein Julia Mulkehay, Chale-tsin and Ellem Mulkehay, adults, and also W. B. McCown, Superintendent of the Kiowa Indian Agency, for and on behalf of Philip Tooisgah, then a minor, are lessors, and wherein Clyde M. Becker, is lessee, which lease was approved on April 14, 1937, by the Secretary of the Interior of the United States of America, and which lease was filed for record on August 1, 1938, in the Office of said County Clerk, and recorded in Book 79 of Misc. records at page 395, of the records of said office. A true and correct photostat copy of which said lease is hereby attached, marked "Exhibit C" for identification and by reference made a part hereof. The land covered by this lease will be hereinafter referred to as "said Tract Three".
- 3. That by virtue of mesne assignments, duly approved by the Secretary of the Interior of the United States of America, the said oil and gas mining leases, and leasehold [fol. 10] estates thereby created and evidenced, have become owned and are owned by this plaintiff, and were so owned during the months of September, October and November, 1942. That the plaintiff has complied with the terms and provisions of said leases, and that the same are in full force and effect according to their terms.

- 4. That the said lands covered by the said several lease constituted portions of the Tribal lands of the Kiowa and Apache Indian Tribes, or of the particular Indians of said Tribes for whom the United States Government held said respective lands in trust. That at the respective times of the making and execution of the said several leases the said lands included in said respective leases were owned by the said respective lessors by or on whose behalf, as lessors, the said leases were respectively executed, which ownership, however, was subject to the supervision and control of the United States Government.
- 5. That the ownership of said lessors by or on whose : behalf said leases were executed, in and to said respective lands was acquired under and by virtue of the provisions of the General Allotment Act of the United States of America, being an Act of Congress approved February 8, 1887, (Chapter 119, 24 Stat. 388) and of later Acts of Congress amendatory thereof. That at the times of the execution of said several leases, the several tracts of land remained under the supervision and control of the United States of America, [fol. 11] and the said leases were executed pursuant to the provisions of said General Aflotment Act, and of said Acts amendatory thereof, and of the Act of Congress of March 3, 1909, (35 Stat. 781, 783). That at the time of the execution of said several leases the said lessors by or on behalf of whom said leases were executed had no power or authority to make and enter into said several leases save and except pursuant to the supervision and control of the United States Government under and by virtue of the Acts of Congress. referred to above.
- 6. That during the said months of September, October and November, 1942, the said lands covered by said several leases remained subject to the suprevision and control of the Government of the United States of America, and said leases and leasehold estates remained subject to said supervision and control, except that prior to said time the said supervision and control has been relinquished and released as to a 7/16ths interest insofar as affected the said lands described as said Tract Three, and that as to said lands described under said Tract Three the supervision and control of said Government remained only as to a 9/16 interest.

- 7. That during the said months of September and October, 1942, the plaintiff as the lessee under said leases produced certain crude oil from said lands covered by said respective leases. That because of all the foregoing, said plaintiff in the operation of said leases and in the production of oil therefrom was and is a Federal instrumentality and agency of said United States Government, and that said respective leases were and are instrumentalities of said United States Government.
- 8. That notwithstanding the above, the defendant asserts that the plaintiff is liable to pay to the Oklahoma Tax Commission gross production tax equal to five per centum of the gross value of the production of the 7/8ths working interest on all such oil produced by it from said respective leasehold estates pursuant to Section 1 of Article 4 of Chapter 66 of the Oklahoma Session Laws of 1935 (pages 271-273), being Section 821 of Title 68 of the Oklahoma Statutes of 1941, and further claims that the plaintiff is liable for the payment of a tax to said Oklahoma Tax Commission on the 7/8ths working interest of all oil so produced by it from said several leases, said tax being in the amount of 1/8th of one cent per barrel on each and every barrel of oil so produced by the plaintiff, the same being an excise tax on oil, commonly called "pro ration taxes" under and by virtue of provisions of Section 1, of Chapter 26, Title 68, of the Oklahoma Session Laws of 1941, (pages 380-381), being Section 1218-1 of Title 68 of the Oklahoma Statutes of 1941.
- 9. That the said plaintiff was not and is not liable for the payment of said gross production taxes or of said excise or pro ration taxes as to any oil produced by it from said lands covered by said leases, except as to the 7/16ths interest in [fol. 13] the 7/8ths working interest of oil produced from said Tract Three, hereinafter set forth, for the reason that the said oil was so produced by this plaintiff acting as a Federal instrumentality and agency as above set forth, and that accordingly the said taxing statutes of the State of Oklahoma were and are not applicable thereto.
- 10. That if it be held that the said taking statutes of the State of Oklahoma are applicable to said oil so produced by the plaintiff from said lands, and that under and pursuant to said taxing statutes such gross production taxes and such

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excise or pro ration taxes are levied on account of such oil so produced therefrom by the plaintiff, then that such taxing statutes, and each of them, were and are illegal, void, and of no effect for the reason that they impose a burden and restriction upon an agency and instrumentality of the said United States Government, and interfere with the performance by this plaintiff of its duties and functions as an instrumentality and agency of said Government of the United States of America. Plaintiff further says that in so imposing a burden, restriction or limitation upon an instrumentality and agency of said Federal Government, the imposition of such taxes infringe upon an attempt to restrict and burden the exercise of said Government's sovereign powers, namely, its plenary powers in the administration and conduct of the properties and affairs of its Indian wards, and that as such, the same is violative of the Constitution of the United States of America.

[fol. 14] 11. That insofar as said taxing statutes of the State of Oklahoma are held to impose taxes upon the oil so produced by this plaintiff from said lands, such statutes, and each of them, are illegal and void for the reason that they are repugnant to the Constitution of the United States of America, and also that they are repugnant to the Acts of Congress above referred to.

12. That by reason of the said Acts of Congress referred to above, and by reason of the Constitution of the United States of America, this plaintiff has a right, privilege or immunity, namely, that it be not subjected to taxes or to any liability for taxes on account of any oil so produced by it from said lands covered by said several leases, save and except only the 7/16ths interest in said Tract Three as to which the supervision and control of the United States. Government has been relinquished as aforesaid.

13. That on the 30th day of October, 1942, in order to avoid heavy penalties being claimed and asserted by the defendant against the plaintiff, this plaintiff paid to the defendant on account of oil produced by it during the month of September, 1942, gross production taxes in the amount of Four Hundred Ninety-Two Dollars and Thirty-Three cents (\$492.33), and excise or pro ration taxes in the amount of Ten Dollars and One Cent (\$10.01) on 80005.32 barrels of oil (Being the 7/8th working interest) produced

- 7. Removal of buildings, improvements, and equipment.—Lesses shall be the owner of and shall have the right to remove from the leased premises, within 90 days after termination of this lease, any and all buildings, structures, casing, material, and/or equipment placed thereon for the purpose of development and operation hereunder, save and except easing in wells and other material, equipment, and structures necessary for the continued operation of wells producing or capable of being produced in paying quantities as determined by the Secretary of the Interior, on said leased land at the time of surrender of this lease or termination thereof; and except as otherwise provided herein, all easing in wells, material, structures, and equipment shall be and become the property of the lessor.
- Relinquishment of supervision by the Secretary of the Interior.—Should the Secretary of the Interior, at any time during the life of this instrument, relinquish supervision as to all or part of the acreage covered hereby, such relinquishment shall not bind lease until said Secretary shall have given 30 days written notice. Until said requirements are fulfilled, lease shall continue to make all payments due hereunder as heretofore in section 3 (c). After notice of relinquishment has been received by leases, as herein provided, this lease shall be subject to the following further conditions:
- (a) All rentals and royalties thereafter accruing shall be paid in the following manner: Rentals and royalties shall be paid to lesser or his successors in title, or to a trustee appointed under the provisions of section 9 hereof. Rentals and royalties shall be paid directly to lessor or his successors in title, or to said trustee as the case may be.
- (b) If, at the time supervision is relinquished by the Secretary of the Interior, lessee shall have made all payments then due hereunder, and shall have fully performed all obligations on its part to be performed up to the time of such relinquishment, then the bond given to secure the performance hereof, on file in the Indian Office, shall be of no further force or effect.
- (c) Should such relinquishment affect only part of the acreage, then lesses may continue to drill and operate the land covered hereby as an entirety: Provided, That lesses shall pay in the manner prescribed by section 3 (c), for the benefit of lessor such proportion of all rentals and royalties due hereunder as the acreage retained under the supervision of the Secretary of the Interior bears to the entire acreage of the lesse, the remainder of such rentals and royalties to be paid directly to lessor or his successors in title or said trustee as the case may be, as provided in subdivision (a) of this section.
- 9. Division of fee.—It is covenanted and agreed that should the fee of said land be divided into separate parcels, held by different owners, or should the rental or royalty interests hereunder be so divided in ownership, after the execution of this lease and after the Necretary of the Interior relinquishes supervision hereof, the obligations of leases hereunder shall not be added to or changed in any manner whatsoever save as specifically provided by the terms of this lease. Notwithstanding such separate ownership, lessee may continue to drill and operate said premises as an entirety: Provided, That each separate owner shall receive such proportion of all rentals and royalties accruing after the vesting of his title as the acreage of the fee, or rental or royalty interest, hears to the entire acreage covered by the lease; or to the entire rental and royalty interest as the case may be: Provided further, That if, at any time after departmental supervision hereof is relinquished, in whole or in part, there shall be four or more parties entitled to rentals or royalties hereunder, whether said parties are so entitled by virtue of undivided interests or by virtue of ownership of separate parcels of the land covered hereby, leases, at his election may withhold the payment of further rentals or royalties (except as to the portion due the Indian lessor while under restriction), until all of said parties shall agree upon and designate in writing and in a recordable instrument a trustee to receive all payments due hereunder on behalf of said parties and their respective successors in title. Payments to said trustee shall constitute lawful payments hereunder, and the sole trisk of an improper or unlawful distribution of said funds by said trustee shall rost upon the parties naming said trustee and their respective successors in title.
- 10. Drilling and producing restrictions. It is covenanted and agreed that the Secretary of the Interior may impose restrictions as to time or times for the drilling of wells and as to the production from any well or wells drilled when in his judgment much action may be processary or proper for the protection of the natural resources of the leased land and the interests of the Indian lessor, and in the exercise of his judgment the Secretary may take into consideration, among other things, Federal laws, State laws, or regulations by competent Federal or State authorities or lawful agreements among operators regulating either drilling or production, or both.
 - Il Unit operation. The parties hereto agree to subscribe to and abide by any agreement for the cooperative or unit devel-

risk of an improper or unlawful distribution of said funds by said trustee shall rest upon the parties naming said trustee and their respective successors in title

- 10. Drilling and producing restrictions. It is covenanted and agreed that the Secretary of the Interior may impose restrictions as to time or somes for the drilling of wells and as to the production from any well or wells drilled when in his judgment such action may be necessary or proper for the protection of the natural resources of the leased land and the interests of the Indian lessor, and in the exercise of his judgment the Secretary may take into consideration, among other things, Federal laws, State laws, or regulations by competent Federal or State authorities or lawful agreements among operators regulating either drilling or production, or both.
- Unit operation. The parties hereto agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the leased lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior, during the period of supervision.
- 12. Helium public emergency. It is covenanted and agreed that belium gas, carbon dioxide gas, and all other natural games are included under the term "gas" as used in this lease, and in the event gas is discovered containing belium the United States Government shall have the right to purchase; at reasonable prices, all or any part of the production and to regulate the amount and manner of production; and in time of war or other public emergency, the United States Government shall have the option to purchase all or any part of the products produced under this lease.
- 13 Conservation. The leases in consideration of the rights herein granted agrees to abide by the provisions of any act of Congress, or any order or regulation prescribed pursuant thereto, relating to the conservation, production, or marketing of oil, gas, or other hydrocarbon substances.
- 14. Helrs and successors in interest.—It is further covenanted and agreed that each obligation bereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors of, or assigns of the respective parties hereto.

IN WITNERS WHEREOF, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned

Two witnesses to execution by lessor

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[fol. 15] from its said oil and gas leasehold estate covering said Tract One, and paid gross production taxes in the amount of Four Hundred Ninety-one Dollars and Thifteen Cents (\$491.13), and excise or pro ration taxes in the amount of Nine Dollars and Ninety-two Cents (\$9.92), on 7938.31 barrels of oil (being the 7/8ths working interest) produced from its oil and gas leasehold estate covering said Tract Two, and paid gross production taxes in the amount of Nine Hundred Fourteen Dollars and Twenty three: Cents (\$914:23), and excise or pro ration taxes in the amount of Eighteen Dollars and Forty-three — (\$18.43) on 14744.92 barrels of oil (being 9/16ths of the 7/8ths working interest) produced from its oil and gas leasehold estate covering said Tract Three. That all of such payments were made to said Oklahoma Tax Commission, and were included in larger payments covering also other gross production taxes and excise or pro ration taxes for said month as to which no complaint is made herein.

14. That at the time of the payment of said gross production taxes and said excise or pro ration taxes for said month, this plaintiff served written notice on said defendant that it claimed that said taxes in the amounts specifically set out above were illegal and void upon the grounds and for the reasons set out in said written notice, and that it would bring a suit against said defendant to recover said void and illegal taxes. That a true and correct copy of said Notice of Intention to File Suit for Recovery of Illegal Taxes is [fol. 16] hereto attached, marked "Exhibit D" for identification, and by reference made a part hereof the same as if fully copied hereon.

15. That by reason of the foregoing, the defendant is indebted to the plaintiff, and the plaintiff is entitled to recover herein on account of this its First Cause of Action the total sum of Nineteen Hundred Thirty-six Dollars and Five Cents (\$1936.05), together with interest at the rate of three per cent (3%) per annum thereon from and after the 30th day of October, 1942; until paid.

Second Cause of Action

Said plaintiff for its Second Cause of Action against the defendant, Oklahowa Tax Commission, alleges and states:

16. That it adopts paragraphs numbered 1 to 12, both inclusive, of its preceding First Cause of Action, and each and every allegation in said paragraphs contained, as a part of this its Second Cause of Action, and by reference makes the same a part hereof, the same as if fully copied herein, and in addition thereto says:

17. That on the 27th day of November, 1942, in order to avoid heavy penalties being claimed and asserted by the defondant against the plaintiff, this plaintiff paid to the defendant on account of oil produced by it during the month of October, 1942 gross production taxes in the amount of Five Hundred Three Dollars and Eighty Cents (\$503.80), and excise or pro ration taxes in the amount of Ten Dollars [fol. 17] and Twenty-Four Cents (\$10,24), on \$191,89 barrels of oil (being the 7/8ths working interest) produced from its said oil and gas leasehold estate covering said Truct One, and paid gross production taxes in the amount of Five Hundred Fifteen Dollars and Three Cents (\$515.03), and excise or pro ration taxes in the amount of Ten Dollars and Thirty Three Cents (\$10.33), on 8265.78 barrels of oil (being the 7/8ths working interest) produced from its oil and gas leasehold estate covering said Tract Two, and paid gross production taxes in the amount of Nine Hundred Thirty-Seven Dollars and Sixty-Six Cents (\$937.66), and excise or pro ration taxes in the amount of Eighteen Dollars and · Eighty-One Cents (\$18.81), on 15047.91 barrels of oil (being 9/16ths of the 7/8ths working interest) produced from its oil and gas leasehold estate covering said Tract Three. all of such payments were made to said Oklahoma Tax Commission and were included in larger payments covering also other gross production taxes and excise or proration taxes for said month as to which no complaint if made herein:

18. That at the time of the payment of said gross production taxes and said excise or pro ration taxes for said month this plaintiff served written notice on said defendant that it claimed that said taxes in the amounts specifically set out above were illegal and void upon the grounds and for the reasons set out in said written notice and that it would [fol. 18] bring a suit against said defendant to recover said void and illegal taxes. That a true and correct copy of said

D. BOX #2420,

I.S.1. Oklahoma.

A. Oklahoma.

A. C. INT. HOMA.

Strument was filed for record of the circle.

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Notice of Intention to File Suit for Recovery of Illegal Taxes is hereto attached, marked "Exhibit E" for identification and by reference made a part hereof the same as if fully copied herein.

19. That by reason of the foregoing the defendant is indebted to the plaintiff, and the plaintiff is entitled to recover herein an account of this its Second Cause of Action the total sum of Nineteen Hundred Ninety-Five Dollars and Eighty-Seven — (\$1995.87) together with interest at the rate of three per cent (3%) per annum thereon from and after the 27th day of November, 1942, until paid.

Wherefore, premises considered, plaintiff prays that it have judgment against the defendant, Oklahoma Tax Commission, herein in the sum of Nineteen Hundred Thirty-Six Dollars and Five Cents (\$1936.05) on account of its First Cause of Action, and in the further sum of Nineteen Hun-Ninety-Five Dollars and Eighty-Seven Cents (\$1995.87) on account of its Second Cause of Action, together vith the costs of this suit, and that it have such other, further and general relief as it may be entitled to receive by law or in equity in the premises.

> (Signed) John R. Ramsey, B. W. Griffith, Ames, Monnet, Hayes & Brown, Attorneys for Plaintiff,

The Texas Company.

EXHIBIT "B" TO PETITION

J. 112 STATES DEPARTMENT OF THE INTERIOR OFFICE CE .: DAY, AFFA, ES

OIL AND GAS MINING LEASE, ALLOTTED INDIAN LANDS

THE STATE OF

January Kor . T ... a minor born in 1975, devisees of .-R.L.-1., decensed (Heirship established under robate 10. 56511-1935).

Annd ar ko

Oklahoma . State of

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Apache

Tribe of Indians, designment herein as

lessor, and

CLYDE M. B.CAER

, State of Oklahoma

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WITNESSETH

1. Lessor, in consideration of a cash bonus of \$ 884.09 , paid to the Superintendent of the Indian Agency having furisdiction, bereinafter called the superintendent, receipt of vanch is hereby acknowledged, and in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lease the exclusive wisht and noted on to dell for might autpart, minare, and dispussion all the ... I will natural man discussion in ... in the ellipsion

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WITNESSETH

1. Lessor, in consideration of a cash bonus of \$ 884.09 1. Lessor, in consideration of a cash bonus of \$. paid to the Superintendent of the Indian Agency having jurisdiction, hereinafter called the superintendent, receipt of vision is hereby acknowledged, and in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does nerely grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the old and natural gas deposits in or under the following-

described tracts of land situated in the county of particularly described as follows:

Caddo

ed Two and the South half of the Northeest quarter of Section Two in Township Five Borth of Range Twelve Seet of the Indian Meridian.

150. Co acres more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph and telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures messessing to the full enjoyment hereof for the term of 10 years from and after the approval hereof by the Becretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.

2. The term "oil and gas supervisor" as employed berein shall refer to such officer or officers as the Secretary of the Interior may designate to supervise oil and gas operations on Indian lands. The term "superintendent" as used herein shall refer to the superintendent or other official in charge of the Indian Agency having jurisdiction over the lands leaced.

2. In consideration of the foregoing, the leases hereby agrees:

(a) Boad. To furnish such boad as may be required by the regulations of the Secretary of the Interior, with satisfactory murely, or United States beads as surely therefor, conditioned upon compliance with the terms of this lease.

Weller—(ii) To drill and produce all wells messessary to effect or protect the leased land from drainage by wells on adjoin-als not the preparty of the langur, or in lieu thereof, to compensate the leaser in full each month for the estimated loss did, That during the parted of supervision by the Secretary of the Interior, the necessity for nd by the oil and one supervisor and payment in the of drilling and production shall be with the determined by the Successory of the Interior; (2) at the election of the leases to drill and produce to public to dell and produce or the product of the leases of well special or the first to the product of the Interior and Successor of the Interior and Successor and Interior a on writing, office require the drilling and

Note:

Following pages are difficult to reproduce, copy being illegible in parts. However, these exhibits have been shot at excellent reduction (10-1 or lower), with no attempt made to select out "illegible" copy.

- (c) Bental and repulty.—To pay, beginning with the date of approval of the lease by the Secretary of the last of \$1.25 per acre per annum in advance during the continuous hereof, the rental so paid for any one year to be a royalty for that year, together with a royalty of 124 percent of the value or amount of all oil, gas, and/or natural g all other hydroenrhon substances produced and saved from the land leased herein, save and except oil, and/or one lesses for development and operation purposes on said lesse, which oil or gas shall be royalty free. During the per vision, "value" for the purposes hereof may, in the discretion of the Secretary, be calculated on the basis of the paid or offered (whether calculated on the basis of short or actual volume) at the time of production for the major part oil of the same gravity, and gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and sold from the where the leased lands are situated, and the actual volume of the markstable product less the content of foreign determined by the oil and gas supervisor. The actual amount realized by the lesses from the cale of said products may, in M discretion of the Secretary, be deemed more evidence of or conclusive evidence of such value. When paid in value, such reg tion shall be due and payable monthly on the last day of the calendar month following the calendar month in which produ when royalty on oil produced is paid in kind, such royalty oil shall be delivered in tanks provided by the lesses on the prowhere produced without cost to the lessor unless otherwise agreed to by the parties thereto, at such time as may be require the lessor: Presided. That the lessee shall not be required to hold such royalty oil in storage longer than 30 days after the end of the calendar month in which said oil is produced: And provided further, That the lesses shall be in no manner responsible or held liable for loss or destruction of such oil in storage caused by acts of God. All rental and royalty payments, except as provided in sections 8 (a) and 4 (c) shall be made by check or draft drawn on a solvent bank, open for the transaction of bus day the check or draft is issued, to the order of the superintendent. It is understood that in determining the value for regulty purposes of products, such as natural gasoline, that are derived from treatment of gas, a reasonable allowance for the cost of manufacture shall be made, such allowance to be two-thirds of the value of the marketable product unless otherwise determined by the Secretary of the Interior on application of the lesses or on his own initiative, and that royalty will be computed on the value of gas or casinghead gas, or on the products thereof (such as residue gas, natural gasoline, propuns, butane, etc.), whichever in the greeder.
- (d) Menthly statements.—To furnish to the oil and gas supervise? monthly statements in detail in such form as may be prescribed by the Secretary of the Interior, showing the amount, quality, and value of all oil, gas, natural gasoline, or other hydrocarbon substances produced and saved during the preceding calendar month as a basis upon which to compute, for the superintendent, the royalty due the lessor. The leased premises and all wells, producing operations, improvements, machinery, and fixtures thereon and connected therewith and all books and accounts of the lessoe shall be open at all times for the inspection of any duly authorised representative of the Secretary of the Interior.
- (e) Log of well.—To keep a log in the form prescribed by the Secretary of the Interior of all the wells drilled by the leases showing the strate and character of the formations passed through by the drill, which log or a copy thereof shall be furnished to the oil and gas supervisor.
- (f) Diligence, prevention of waste.—To exercise reasonable diligence in drilling and operating wells for oil and gas on the lands covered hereby, while such products can be secured in paying quantities; to carry on all operations becomes in a good and workmanlike manner in accordance with approved methods and practice, having due regard for the prevention of waste of oil or gas developed on the land, or the entrance of water through wells drilled by the lesses to the productive sands or oil or gas bearing strata to the destruction or injury of the oil or gas deposits, the preservation and conservation of the property for future productive operations, and to the health and safety of workmen and employees; to plug securely all wells before abandoning the same and to effectually shut off all water from the oil or gas-bearing strata; not to drill any well within 200 feet of any house or barn now on the premises without the lessor's written consent approved by the superintendent; to carry out at the expense of the lessee all reasonable orders and requirements of the oil and gas supervisor relative to prevention of waste, and preservation of the property and the health and safety of workmen; to bury all pipe lines crossing tillable lands below plow depth unless other arrangements therefor are made with the experiment; to pay the 'esser all damages to crops, buildings, and other improve-

productive operations, and to the health and safety of workmen and employees; to plug security all wells before abandoning the same and to effectually shut off all water from the oil or gas-bearing strata; not to drill any well within 200 feet of any house or barn now on the premises without the lessor's written consent approved by the superintendent; to carry out at the expense of the lessee all reasonable orders and requirements of the oil and gas supervisor relative to prevention of waste, and greservation of the property and the health and safety of workmen; to bury all pipe lines crossing tillable lands below plow depth unless other arrangements therefor are made with the superintendent; to pay the lessor all damages to crops, buildings, and other improvements of the lessor occasioned by the lessee's operations: Provided, That the lessee shall not be held responsible for delays or casualties occasioned by causes beyond the lessee's control.

- (g) Regulations.—To abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases: Provided, That no regulations hereafter approved shall effect a change in rate of royalty or annual rental herein specified without the written consent of the parties to this lease.
- (A) Assignment of lease.—Not to assign this lease or any interest therein by an operating agreement or otherwise nor to sublet any portion of the leased premises before restrictions are removed, except with the approval of the Secretary of the Interior. If this lease is divided by the assignment of an entire interest in any part of it, each part shall be considered a separate lease under all the terms and conditions of the original lease.
 - 4. The leasor expressly reserves:
- (a) Disposition of surface.—The right to lease, sell, or otherwise dispose of the surface of the lands embraced within this lease under existing law or laws hereafter enacted, such disposition to be subject at all times to the right of the lease herein to the use of so much of said surface as is necessary in the extraction and removal of the oil and gas from the land herein described.
- (b) Use of gas.—The right to use sufficient gas free of charge for all stoves and inside lights in the principal dwelling house on said lands by making connection at his own expense with the well or wells thereon, the use of such gas to be at the lessor's risk at all times.
 - (c) Royalty in kind.—The right to elect on 30 days' written notice to take lessor's royalty in kind."
- 5. Surrender and termination.—The league shall have the right at any time during the term hereof to surrender and terminate this lease or any part thereof upon the payment of all rentals, royalties, and other obligations due and payable to the lease; and in the event restrictions have not been removed, upon a showing satisfactory to the Secretary of the Interior that full provision has been made for conservation and protection of the property and the proper abandonment of all wells drilled on the portion of the lease surrendered, the lease to continue in full force and effect as to the lands not so surrendered. If this lease has been recorded lease shall file a recorded release with his application to the superintendent for termination of this lease.
- 6. Cancelation and forfeiture.—When, in the opinion of the Secretary of the Interior, there has been a violation of any of the terms and conditions of this lease before restrictions are removed, the Secretary of the Interior shall have the right at any time after 30 days notice to the lessee, specifying the terms and conditions violated, and after a hearing, if the lessee shall so request within 30 days of receipt of notice, to declare this lease null and void, and the lessor shall then be entitled and authorised to take immediate possession of the land: Provided, That after restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of this contract by the lessoe.

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- We desire and requiry.—To pay, beginning with the date of approval of the laner by the flooredary of the Interior, a restal of \$1.50 per cases per cases in account of the requiring the continuous harves, the remain so pied for any one year to be excited on the says by or that you, taggether with a repreiety of 135 per period of the value or assemble of all oil, and, and, and are all other hydrocarden extractions proposed and saved from the hand leased herein, cave and except oil, and/or gas used by the tense for development and operation perpense on until hans, which off or gas shall be regulty from. During the period of supervises, "when it is not perfect on the hand of the discretion, is of the flowering, be estimated on the head of the indices price period (whether calculated on the head of the discretion) at the time of prediction for the major portion of the til of the assembly and an acceptance of short or actual volume) at the time of prediction for the major portion of the till of the assembly and an acceptance and sold from the field when the heades period is the highest period of and prediction and sold from the field when the headest period and sold from the field when the headest period and sold from the field when the headest period and sold from the field when the headest period and sold from the field when the headest period and sold from the field when the headest period and the cases of of foreign antiferences and determined by the descent of the field in value. Then period in which produced by the leavest of the field in the sold of the antiference of an acceptance of an acceptance of an acceptance of an acceptance of the field of the cases of an acceptance of a sold the leaves of the headest period by the lines on the predicted by the lines on the predicted by the lines on the predicted by the lines of the sold of t
- (4) Minutely applements.—To furnish to the oil and one supervisor? menthly statements in detail in such form as may be presented by the florestory of the Interior, aboving the amount, quality, and value of all oil, one, natural qualities, or other hydrocarbon substates produced and saved during the presenting calcular months as a basis upon yitich to compute, for the superintendent, the reporty due the inner. The inquire produce and all with, producing operations, improvements, machinery, and finites therein and commented therewith and all basis and accounts of the inner shall be open at all times for the importion of any day authorized representative of the Secretary of the Interior.
- (d) Log of wall—To know a log in the form presented by the fouretary of the Interior of all the walls defined by the house straight the simple and phentature of the formations person through by the drill, which log or a copy thereof shall be furnished to the order and the formation of the driving the formation of the formation of the driving the formation of th
- (f) Bellegere, provides of weeks.—To exercise reasonable diagnose in deliting and exerciting two off and gas on the lands owned in make, with reak productions in secured in paying quantities; to easy on all exercitions havegades in a good and verticable amount in the contraction of the provides of all or gas developed on the land, or the contraction of water through relie defilled by the lance to the productive anade or oil or give lands of the factor of the property for fractions and concervation of the property for fractions and concervation, and to the lands and nately of verticaes and employees; to play according to the lands and nately of verticaes and employees; to play according to the lands to the lands and nately of verticaes and employees; to play according to the lands of any house or large lands without the lance's written content approved by the expertationdant; to carry out at the expense of the lance of manually and relative to provide to provide the lands and procuration of the property and the health and early of workness; to bury at pipe times created effects hand below plow depth union other arrangements therefor are made with the experimentalist; to pay the lance all changes to drope, buildings, and other improvements of the lance contained by the lance's operations: Provided, That the leave shall not be hald responsible for delays or

the lease all reasonable orders and requirements of the oil and gas supervisor relative to prevention of waste, and preservation of the preparity and the health and safety of workmen; to bury all pipe lines evening tillable lands below plow depth unless other arrangements therefor are made with the superintendent; to pay the leaser all damages to crops, buildings, and other improvements of the leaser secondened by the leaser's operations: Precised, That the leases shall not be held responsible for delays or consulting associated by special the leases's control.

- (d) Begulations.—To abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leasure Provided. That no regulations hereafter approved shall effect a change in rate of royalty or annual result herein qualified without the written consent of the parties to this leasu.
- (A) Academical of home.—Not to analyze this lease or any interest therein by an operating agreement or otherwise nor to sublist any portion of the homest president before restrictions are removed, except with the approval of the Secretary of the Interior. If this lease is divided by the assignment of an entire interest in any part of it, each part shall be considered a separate lease under all the terms and conditions of the original lease.
 - 4. The leaser expressly reserves:
- (a) Disposition of surface.—The right to lease, sell, or otherwise dispose of the surface of the lands embraced within this lease under existing law or laws hereafter exected, such disposition to be subject at all times to the right of the lease herein to the use of so much of said surface as is necessary in the extraction and removal of the oil and gas from the land herein described.
- (b) Use of gen.—The right to use sufficient gas free of charge for all steves and inside lights in the principal dwelling house on said lands by making connection at his own expense with the will or wells thereon, the use of such gas to be at the lessor's risk at all these.
 - (c) Repulty to kind.—The right to elect on 30 days' written nation in help lyper's payably in kind.
- 8. Surrender and termination.—The lesses shall have the state about the other three to surrender and terminate this lesse or any part thereof upon the payment of all supply reported that the lesser; and in the event restrictions have not been removed, upon a district that the laterier of the Interior that full provision has been made for conservation and protection of the property and the lesses of all wells drilled on the portion of the lease surrendered, the lease to continue in full force and the lease surrendered, the lease to continue in full force and the lease state of the lease shall the a recorded release with his application to the lease shall the a recorded release with his application to the lease shall the a recorded release with his application to the lease that lease the lease shall the a recorded release with his application to the lease that lease the lease that lease the lease that lease the lease the lease that lease the lease the lease that lease the lease that lease the lease that lease the lease the lease that lease the lease that lease the lease the lease that lease the lease the lease that lease the le
- 6. Canceletten and furfatture.—When, in the opinion of the large translation of the ferms and conditions of this issue before restrictions are reserved. It is the ferms and follows the ferms and south the ferms and the ferms a

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- 7. Removal of bt lings, improvements, and equipment.—Lesses shall be the owner of and shall have the right to remove from the leased premises, within 90 days after termination of this lesse, any and all buildings, structures, easing, mas lal, and/or equipment placed thereon for the purpose of development and operation hereunder, save and except easing in wells and other material, equipment, and structures necessary for the continued operation of wells producing or capable of being produced in paying quantities as determined by the Secretary of the Interior, on said leased land at the time of surrender of this lease or termination-thereof; and except as otherwise provided herein, all easing in wells, material, structures, and equipment shall be and become the property of the lessor.
 - 8. Relinquishment of supervision by the Secretary of the Interior.—Should the Secretary of the Interior, at any time during the life of this instrument, relinquish supervision as to all or part of the acreage covered hereby, such relinquishment shall not bind lessee until said Secretary shall have given 30 days written notice. Until said requirements are fulfilled, lessee shall continue to make all payments due hereunder as heretofore in section 3 (c). After notice of relinquishment has been received by lessee, as herein provided, this lesse shall be subject to the following further conditions:
 - (a) All rentals and royalties thereafter accruing shall be paid in the following manner: Rentals and royalties shall be paid to lessor or his successors in title, or to a trustee appointed under the provisions of section 9 hereof. Rentals and royalties shall be paid directly to lessor or his successors in title, or to said trustee as the case may be.
 - (b) If, at the time supervision is relinquished by the Secretary of the Interior, lessee shall have made all payments then due hereunder, and shall have fully performed all obligations on its part to be performed up to the time of such relinquishment, then the bond given to secure the performance hereof, on file in the Indian Office, shall be of no further force or effect.
 - (c) Should such relinquishment affect only part of the acreage, then lessee may continue to drill and operate the land covered hereby as an entirety: Provided, That lessee shall pay in the manner prescribed by section 3 (c), for the benefit of lessor such proportion of all rentals and royalties due hereunder as the acreage retained under the supervision of the Secretary of the Interior bears to the entire acreage of the lesse, the remainder of such rentals and royalties to be paid directly to lessor or his successors in title or said trustee as the case may be, as provided in subdivision (a) of this section.
 - 9. Division of fee.—It is covenanted and agreed that should the fee of said land be divided into separate parcels, held by different owners, or should the rental or royalty interests hereunder be so divided in ownership, after the execution of this lease and after the Secretary of the Interior relinquishes supervision hereof, the obligations of leases hereunder shall not be added to or changed in any manner whatsoever save as specifically provided by the terms of this lease. Notwithstanding such separate ownership, leases may continue to drill and operate said premises as an entirety: Provided, That each separate owner shall receive such proportion of all rentals and royalties accruing after the vesting of his title as the acreage of the fee, or rental or royalty interest, bears to the entire acreage covered by the lease; or to the entire rental and royalty interest as the case may be: Provided further, That if, at any time after departmental supervision hereof is relinquished, in whole or in part, there shall be four or more parties entitled to rentals or royalties hereunder, whether said parties are so entitled by virtue of undivided interests or by virtue of ownership of separate parcels of the land covered hereby, leases, at his election may withhold the payment of further rentals or royalties (except as to the portion due the Indian leasor while under restriction), until all of said parties shall agree upon and designate in writing and in a recordable instrument a trustee to receive all payments due hereunder on behalf of said trustee and their respective successors in title. Payments to said trustee shall constitute lawful payments hereunder, and the sole risk of an improper or unlawful distribution of said funds by said trustee shall rest upon the parties naming said trustee and their respective successors in title.
 - 10. Drilling and producing restrictions.—It is covenanted and agreed that the Secretary of the Interior may impose restrictions as to time or times for the drilling of wells and as to the production from any well or wells drilled when in his judgment such action may be necessary or proper for the protection of the natural resources of the leased land and the interests of the Indian lessor, and in the exercise of his judgment the Secretary may take into consideration, among other things, Federal laws, State laws, or regulations by competent Federal or State authorities or lawful agreements among operators regulating either drilling or production, or both.
 - 11. Unit operation.—The parties hereto agree to sul@cribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the leased lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior, during the period of supervision.

parties and their respective successors in title. Payments to said trustee shall constitute lawful payments hereunder, and the sole risk of an improper or unlawful distribution of said funds by said trustee shall rest upon the parties naming said trustee and their respective successors in title.

- 10. Drilling and producing restrictions.—It is covenanted and agreed that the Secretary of the Interior may impose restrictions as to time or times for the drilling of wells and as to the production from any well or wells drilled when in his judgment such action may be necessary or proper for the protection of the natural resources of the leased land and the interests of the Indian lessor, and in the exercise of his judgment the Secretary may take into consideration, among other things, Federal laws, State laws, or regulations by competent Federal or State authorities or lawful agreements among operators regulating either drilling or production, or both.
- 11. Unit operation.—The parties hereto agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the leased lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior, during the period of supervision.
- 12. Helium public emergency. It is covenanted and agreed that belium gas, carbon dioxide gas, and all other natural gases are included under the term "gas" as used in this lease, and in the event gas is discovered containing belium the United States Government shall have the right to purchase, at reasonable prices, all or any part of the production and to regulate the amount and manner of production; and in time of war or other public emergency, the United States Government shall have the option to purchase all or any part of the products produced under this lease.
- 13. Conservation. —The lessee in consideration of the rights herein granted agrees to abide by the provisions of any act of Congress, or any order or regulation prescribed pursuant thereto, relating to the conservation, production, or marketing of oil, gas, or other hydrocarbon substances.
- 14. Heirs and successors in interest.—It is further covenanted and agreed that each obligation bereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the beirs, executors, administrators, successors of, or assigns of the respective parties hereto.

IN WITNESS WHEREOF, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned:

Two witnesses to execution by lessor:

Anedarko, Okla.

Anadarko, Okla.

S

f.B.McCown, Supt.Kiowe Indian Agency, for and on behalf of Kosope Maynebemah, a minor born in 1925.

Lucer May Herbonat 108AL)

Ethel C. Silvery P. O. _ Anadarko, Oklahoma. Dechon P. O. Anadarko, Oklahoma. Before me, a notary public, on this day of Oliver Maynebeach, an edult born in 1912; and I.R. McCown, Sept. Lieve Dellan Account, for me behalf of Record Maynebeach, a minor born in to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that ... consected the same as ... The LT free and voluntary act and deed for the uses and purposes therein set forth. Wy proposalesion expires ... Jame. 20, 1940. UNITED STATES DEPARTMENT OF THE INTERIOR KHH 23 193; Washington, D/C. APPROVED Osca, L. Chageman Washington, 1) Posser, L. Chapeman Filed for record this day of

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- to, and equipment.-- Lesses shall be the evener of and shall have the right to remove from the board grapher, which to days after termination of this been, any and all middless, structure, comes majorial, and/or equipment placed placed by the purpose of development and operation development, and appropriate or expects of majorial expenses in a development and development for the continued operation of with producing or expects of many produced in paying quantities to described by the florestery of the Interior, on said based had all the time of continued the producing of the florestery of the Interior, on said based had all the time of continued the producing of the Interior, or said based had all the time of continued the produced of the Interior, or said based had all the time of continued that had a said to the produced of the latest to the produced of the latest to the become the property of the lessor.
 - Bellingshikment of supervision by the Secretary of the Interior,—Should the Secretary of the Interior, at any time during the life of this instrument, relinquish supervision as to all or part of the surrage covered hereby, such relinquishment shall not blad lesses until said Secretary shall have given 30 days written notion. Until said requirements are fulfilled, inner shall continue to make all payments due hereunder as heretainer in certica 3 (c). After notion of relinquishment has been received by lesses, as herein provided, this lesses shall be subject to the following further conditions:
 - (a) All restals and revelties thereafter accruing shall be paid in the following manner: Restals and revelties shall be paid to lessor or his successors in title, or to a treates appointed under the provisions of coation 9 hereof. Bentals and regulities at the paid directly to lessor or his successors in title, or to said trustee as the case may be.
 - (b) If, at the time supervision is relinquished by the Secretary of the Interior, lease shall have made all payments than due hereunder, and shall have fully performed all obligations on its part to be performed up to the time of such relinquishment, the the bond given to secure the performance hereof, on the in the Indian Office, shall be of no further force or effect.
 - (c) Should such relinquishment affect only part of the acreage, then have may continue to drill and operate the had covered hereby as an entirety: Provided, That issues shall pay in the manner presented by section 3 (c), for the boardt of herer queb proportion of all rentels and royalties due herecader as the acreage retained under the supervision of the Secretary of the rior bears to the entire acreage of the losse, the remainder of such rentals and royalties to be paid directly to lessor or his processors in title or said trustee as the case may be, as provided in subdivision (a) of this cost
 - 9. Division of fee.—It is covenanted and agreed that should the fee of said land be divided in to separate parents, held by different owners, or should the restal or revailty interests hereender be so divided in ownership, after the execution of this least and after the flooretary of the interior relinquishes supervision hereof, the obligations of least hereunder shall not be added to or changed in any measure whatevever cave as specifically provided by the terms of this least. Notwithstanding such separate ownership, home may continue to drill and operate said premises as an entirety: Previded, That each separate owner shall receive such proportion of all rentals and royalties accruing after the vesting of his title as the parenge of the fee, or rental or royalty interest, bears to the entire acreage covered by the lease; or to the entire restal and royalty interest as the ones may be: Provided further, That if, at any time after departmental supervision hereof is sufinquished, in whole or in part, there shall be few or more parties estitled to restals or royalties hereunder, whether said parties are so settled by virtue of undivided interests or by virtue of ownership of separate parents of the land covered hereby, leases, at his election may withhold the payment of further restals or royalties (except as to the portion due the Indian lessor while under restriction), until all of said parties shall agree upon and designate in writing and in a recordable instrument a trustee to receive all payments due hirounder on behalf of said parties and their respective successors in title. Payments to said trustee shall constitute lawful payments herounder, and the sole rick of an improper or unlawful distribution of said funds by said trustee shall rest upon the parties naming said trustee and their respective successors in Mile.
 - 10. Drilling and preducing restrictions.—It is covenanted and agreed that the Secretary of the Interior may impose restrictions as to time or times for the drilling of wells and as to the production from any well or wells drilled when in his judgment such action may be necessary or proper for the protection of the natural resources of the leased land and the interests of the Indian lessor, and in the exercise of his judgment the Secretary may take into consideration, among other things, Federal laws, State laws, or regulations by competent Federal or State authorities or lawful agreements among operators regulating either drilling or production, or both.
 - 11. Unit exercition.—The parties hereto agree to subscribe to and abide by any agreement for the ecoperative or unit development of the field or area, affecting the leaned lands, or any pool thereof, if and when collectively adopted by a majority operatand announced by the Aspertury of the Interior, during the period of supervision.

upon and designate in writing and in a recordable instrument a trustee to receive all payments due hereunder on tabalf of said parties and their respective successors in title. Payments to said trustee shall constitute lawful payments hereunder, and the sole rick of an improper or unlawful distribution of said funds by said trustee shall rest upon the parties naming said trustee and their respective successors in title.

- 10. Drilling and preducing restrictions.—It is covenanted and agreed that the Secretary of the Interior may impose restrictions as to time or times for the drilling of wells and as to the production from any well or wells drilled when in his judgment such action may be necessary or proper for the protection of the natural resources of the leased land and the interests of the Indian lessor, and in the exercise of his judgment the Secretary may take into conscieration, among other things, Pederal laws, State laws, or regulations by competent Federal or State authorities or lawful agreements among operators regulating either drilling or production, or both.
- 11. Unit operation.—The parties hereto agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the leased lands, or any pool thereof, if and when collectively adopted by a majority operating interest therein and approved by the Secretary of the Interior, during the period of supervision.
- 12. Hellum public emergency.—It is covenanted and agreed that belium gas, carbon dioxide gas, and all other natural gases are included under the term "gas" as used in this lease, and in the event gas is discovered containing helium the United States Government shall have the right to purchase, at reasonable prices, all or any part of the production and to regulate the amount and manner of production; and in time of war or other public emergency, the United States Government shall have the option to purchase all or any part of the products produced under this lease.
- 13. Conservation.—The lesses in consideration of the rights herein granted agrees to abide by the provisions of any set of Congress, or any order or regulation prescribed pursuant thereto, relating to the conservation, production, or marketing of oil. gas, or other hydrocarbon substances.
- 14. Heirs and successors in interest.—It is further covenanted and agreed that each obligation herounder shall extend to and be binding upon, and every benefit hereof shall inure to, the betre, executors, administrators, successors of, or assigns of the respective parties heruto.

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UNITED STATES

DEPARTMENT OF THE INTERIOR 1-51-184-22974

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- (c) Readth and revalty.—To pay, beginning with the date of approval of the lease by the Secretary of the Interior, a rental of \$1.26 per sere per annum in advance during the continuance bereof, the rental so paid for any one year to be credited on the royalty for that year, together with a royalty of 124 percent of the value or amount of all oil, gas, and/or natural gasolina, and/or all other hydrocarbon substances produced and saved from the land leased herein, save and except oil, and/or gas used by the lessee for development and operation purposes on said lease, which oil or gas shall be royalty free. During the period of supervision, "value" for the purposes hereof may, in the discretion of the Secretary, be calculated on the basis of the highest pries paid or offered (whether calculated on the basis of short or actual volume) at the time of production for the major portion of the oil of the same gravity, and gas, and/or natural gasuline, and/or all other hydrocarbon substances produced and sold from the field where the leased lands are situated, and the actual volume of the marketable product less the content of foreign substances as determined by the oil and gas supervisor. The actual amount realised by the losses from the sale of said products may, in the discretion of the Becretary, be deemed mere evidence of or conclusive evidence of such value. When paid in value, such royalties shall be due and payable monthly on the last day of the calendar month following the calendar month in which produced; when royalty on oil produced is paid in kind, such royalty oil shall be delivered in tanks provided by the lesses on the premises where produced without cost to the lessor unless otherwise agreed to by the parties thereto, at such time as may be required by the lessor: Provided, That the lessee shall not be required to bold such royalty oil in storage longer than 30 days after the end of the calendar month in which said oil is produced: And provided further, That the lesses shall be in no manner responsible or held liable for loss or destruction of such oil in storage caused by acts of God. All rental and revalty payments, except as provided in sections 8 (a) and 4 (c) shall be made by check or draft drawn on a solvent bank, open for the transaction of business on the day the check or draft is issued, to the order of the superintendent. It is understood that in determining the value for revalty purposes of products, such as natural gasoline, that are derived from treatment of gas, a reasonable allowance for the cost of manufacture shall be made, such allowance to be two-thirds of the value of the marketable product unless otherwise determined by the Secretary of the Interior on application of the lessee or on his own initiative, and that royalty will be computed on the value of gas or casinghead gas, or on the products thereof (such as residue gas, natural gasoline, propans, butane, etc.), whichever is the greater.
- (d) Monthly statements.—To furnish to the oil and gas supervisor I monthly statements in detail in such form as may be prescribed by the Secretary of the Interior, showing the amount, quality, and value of all oil, gas, natural gasoline, or other hydrocarbon substances produced and saved during the preceding calendar month as a basis upon which to compute, for the superintendent, the royalty due the lessor. The leased premises and all wells, producing operations, improvements, machinery, and fixtures thereon and connected therewith and all books and accounts of the lessos shall be open at all times for the inspection of any duly authorised representative of the Secretary of the Interior.
- (e) Log of well.—To keep a log in the form prescribed by the Secretary of the Interior of all the wells drilled by the lesses showing the strate and character of the formations passed through by the drill, which log or a copy thereof shall be fermished to the oil and gas supervisor.
- (f) Diligence, prevention of waste.—To exercise reasonable diligence in drilling and operating wells for oil and gas on the lands covered hereby, while such products can be secured in paying quantities; to carry on all operations hereunder in a good and workmanlike manner in accordance with approved methods and practice, having due regard for the prevention of waste of oil or gas developed on the land, or the entrance of water through wells drilled by the lesses to the productive sands or oil or gas-bearing strata to the destruction or injury of the oil or gas deposits, the preservation and conservation of the property for future productive operations, and to the health and safety of workmen and employees; to plus secure vall wells before abandoning the same and to effectually shut off all water from the oil or gas-bearing strata; not to drill any well within 200 feet of any house or barn now on the premises without the lessor's written consent approved by the superintendent; to carry out at the expense of the lesses all reasonable orders and requirements of the oil and gas supervisor relative to prevention of waste, and preservation of the property and the health and safety of workmen; to bury all pipe lines crossing tillable lands below plow depth unless other arrangements therefor are made with the superintendent; to pay the lessor all damages to crops, buildings, and other improvements of the lessor corradored by the lessor overation.

the same and to effectually shut off all water from the oil or gas-bearing strata; not to drill any well within 200 feet of any house or barn now on the premises without the lessor's written consent approved by the superintendent; to carry out at the expense of the lessoe all reasonable orders and requirements of the oil and gas supervisor relative to prevention of wasts, and preservation of the property and the health and safety of workmen; to bury all pipe lines crossing tillable lands below plow depth unless other arrangements therefor are made with the superintendent; to pay the lessor all damages to crops, buildings, and other improvements of the lessor occasioned by the lessoe's operations: Provided, That the lessoe shall not be held responsible for delays or casualties occasioned by causes beyond the lessoe's control.

- (g) Regulations.—To abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases: Provided, That no regulations hereafter approved shall effect a change in rate of royalty or annual rental herein specified without the written consent of the parties to this lease.
- (A) Assignment of lease.—Not to assign this lease or any interest therein by an operating agreement or otherwise nor to sublet any portion of the leased premises before restrictions are removed, except with the approval of the Secretary of the Interior. If this lease is divided by the assignment of an entire interest in any part of it, each part shall be considered a separate lease under all the terms and conditions of the original lease.
 - 4. The lessor expressly reserves:
- (a) Disposition of surface.—The right to lease, sell, or otherwise dispose of the surface of the lands embraced within this lease under existing law or laws hereafter enacted, such disposition to be subject at all times to the right of the leases herein to the use of so much of said surface as is necessary in the extraction and removal of the oil and gas from the land herein described.
- (b) Use of gas.—The right to use sufficient gas free of charge for all stoves and inside lights in the principal dwelling house on said lands by making connection at his own expense with the well or wells thereon, the use of such gas to be at the lessor's risk at all times.
 - (c) Reyalty in kind.—The right to elect on 30 days' written notice to take lessor's royalty in kind.
- 5. Surrender and termination.—The lease shall have the right at any time during the term hereof to surrender and terminate this lease or any part thereof upon the payment of all rentals, royalties, and other obligations due and payable to the leaser; and in the event restrictions have not been removed, upon a showing satisfactory to the Secretary of the Interior that full provision has been made for conservation and protection of the property and the proper abandonment of all wells drilled on the portion of the lease surrendered, the lease to continue in full force and effect as to the lease agreendered. If this lease has been recorded leases shall file a recorded release with his application to the superintendent for termination of this lease.
- 6. Cancelation and ferfeiture.—When, in the opinion of the flacestary of the interior, there has been a violation of any of the terms and conditions of this lease before restrictions are removed, the flacestary of the interior shall have the right at any time after 30 days notice to the lease, specifying the terms and scaditions violated; and after a hearing, if the lease shall so request within 30 days of receipt of notice, to declare this lease null and void, and the lease shall then be entitled and authorised to take immediate possession of the land: Provided, That after restrictions are leasered the leaser shall have and be entitled to any available remedy in law or equity for breach of this contract by the leases.

If this lease covers lands under the jurisdiction of the Manageria Tribes Indian Agency, the statements referred to shall sent to the oil and gas inspector at that agency

^{6-4.} Division of Income among Lossors;—It is hereby agreed and understood by and between the lossors hereto that all income due them from this losse shall be divided among them in the perpertion that the serenge owned by cook boars to the entire serenge lossed at the time such income is due.

Anadarko, Oklahoma. Calbeboy, carelts, and W.B. McCorn, Supt. Flows Indian pawn to be the identical person who executed the within and foregoing lease, and acknowledged to me that free and voluntary act and deed for the uses and purposes therein set forth. UNITED STATES DEPARTMENT OF THE INTERIOR APR 14 1337 Washington, D. C. APPROVED UNITED STATES DEPARTMENT OF THE INTERIOR APR 14 1337 Washington, D. C., APPROVED (Sgd.) USCAR L. CHAPMAN . Issustant Secretary of the Interior Filed for record this day of o'clock Rental received, 8



Notice of Intention to File Suit for Recovery of Illegal Taxes

To Oklahoma Tax Commission:

The Texas Company herein tenders its two checks in the sums of \$31,103.30 and \$553.25, respectively, being in payment of the Oklahoma Gross Production taxes and of the Oklahoma Proration taxes, respectively, on oil purchased by it at the wells (including also purchases so made by its Oil Purchase Department from its Producing Department) in the State of Oklahoma during the month of September, 1942. Of said taxes so paid, said The Texas Company hereby gives notice that it complains that the following are illegal and void, namely:

First. Gross Production taxes of \$492.33 and Provation taxes of \$10.01 on 8005.32 barrels of oil produced from its oil and gas leasehold estate covering Southwest Quarter of Southwest Quarter of Southwest Quarter of Section 35, Township 6 North, Range 12 West.

Second. Gross Production taxes of \$491.13 and Proration taxes of \$9.92 on 7938.31 barrels of oil produced from its oil and gas leasehold estate covering lots 1 and 2 and South Half of Northeast Quarter of Section 2, Township 5 North, Range 12 West.

* Third. Gross Production taxes of \$914.23 and Propation taxes of \$18.43 on 14744.92 barrels of oil produced from its oil and gas leasehold estate covering Southeast Quarter [fol. 32] of Section 2, Township 5 North, Range 12 West.

All of said properties being in Caddo County, Oklahoma. The above sets out the number of barrels of oil so purchased from said properties, less the one-eighth royalty oil, except that as to said Southeast Quarter of said Section 2, the said 14744.92 barrels is 9/16 of the seven-eighths working interest in all oil so produced.

Said The Texas Company states that said Taxes itemized above, in the total sum of \$1936.05 are illegal and void for the reason that as to the lands described in each of the above paragraphs numbered "First", "Socond" and "Third", respectively, it is the holder of a departmental

oil and gas mining lease pursuant to which said oil was produced, and that said-leases cover lands of restricted Indians and were and are subject to the supervision and control of the United States Government, except that as to the said lease covering said lands set out in said paragraph numbered "Third" the said supervision and control thereof has been relinquished as to a 7/16 interest, and the revalty interest as to said last referred to lands is claimed to be held by restricted Indians only as to a 9/16 interest; that except as stated above said respective leases are instrumentalities of the United States Government, and that The Texas Company in the operation thereof and in the production of such oil was and is a Federal instrumentailty [fol. 33] and agency; and that the above taxes in said sum of \$1936.05 are illegal and void and violative of the Constitution of the United States of America because they constitute an attempt by the State of Oklahoma to tax a Federal instrumentality and agency.

Notice is hereby given that within the time allowed by law, suit will be brought by The Texas Company against

you to recover said void and illegal taxes.

Dated this 29th day of October, 1942.

The Texas Company, by (Signed) H. L. Stewart, Agent.

The original Notice of which the above and foregoing is a copy, was received on this 30 day of October, 1942.

L. L. Leininger, Director Gross Production Division,
Oklahoma Tax Commission.

Filed In District Court, Oklahoma County, Okla. Mar. 29, 1945. By W. H. Regian, Deputy.

[fol. 34] Exhibit "E" to Petition

Notice Of Intention To File Suit For Recovery Of Illegal Taxes

To Oklahoma Tax Commission:

The Texas Company hereby tenders its two checks in the sums of \$31,994.68 and \$568.62, respectively, being in payment of the Oklahoma Gross Production Taxes and of the Oklahoma Proration Taxes, respectively, on oil purchased by it at the wells (including also purchases so made by its Oil Purchase Department from its Producing Department) in the State of Oklahoma during the month of Oklahoma, 1942. (Of said taxes so paid, said The Texas Company hereby gives notice that it complains that the following are illegal and void, namely:

First. Gross Production Taxes of \$503.80 and Proration Taxes of \$10.24 on 8,191.89 barrels of oil produced from its oil and gas leasehold estate covering Southwest Quarter of Southwest Quarter of Section 35, Township 6 North, Range 12 West.

Second. Gross Production taxes of \$515.03 and Proration taxes of \$10.33 on 8,264.78 barrels of oil produced from its oil and gas leasehold estate covering Lots 1 and 2 and South Half of Northeast Quarter of Section 2, Township 5 North, Range 12 West.

Third. Gross Production taxes of \$937.66 and Proration taxes of \$18.81 on 15,047.91 barrels of oil produced from its oil and gas leasehold estate covering Southeast Quarter of Section 2, Township 5 North, Range 12 West.

[fol. 35] All of said properties being in Caddo County, Oklahoma. The above sets out the number of barrels of oil so purchased from said properties, less the one-eighth royalty oil, except that as to said Southeast Quarter of said Section 2 the said 15,047.91 barrels is 9/16 of the seven-eighths working interest in all oil so produced.

Said The Texas Company states that said taxes itemized above, in the total sum of \$1,995.87 are illegal and void for the reason that as to the lands described in each of the above paragraphs numbered "First", "Second" and "Third", respectively, it is the holder of a departmental oil and gas mining lease pursuant to which said oil was produced, and that said leases cover lands of restricted Indians and were and are subject to the supervision and control of the United States Government except that as to the said lease covering said lands set out in said paragraph numbered "Third" the said supervision and control thereof has been relinquished as to a 7/16 interest, and the royalty interest as to said last referred to lands is claimed to be held by restricted Indians only as to a 9/16 interest; that except as stated above said respective leases

are instrumentalities of the United States Government, and that The Texas Company in the operation thereof and in the production of such oil was and is a Federal instrumentality and agency; and that the above taxes in said sum of \$1,995.87 are illegal and void and violative of the Constitution of the United States of America and of the Acts of Congress of the United States of America because they [fol. 36] constitute an attempt by the State of Oklahoma to tax a Federal instrumentality and agency.

Notice is hereby given that within the time allowed by law, suit will be brought by The Texas Company against

you to recover said void and illegal taxes.

Dated this 25th day of November, 1942.

The Texas Company, by H. L. Stewart, Agent.

The original Notice of which the above and foregoing is a copy, was received on this — day of November, 1942. (Stamped): Mail Division, Received, Nov. 27, 1942. Oklahoma Tax Commission.

[fol. 37] [File endorsement omitted.]

[fol. 38] IN THE DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

·Praecipe for Summons—Filed November 30, 1942

The Clerk of said Court will issue a Summons in the above entitled cause, directed to the Sheriff of Oklahoma County, against the Defendant, to-wit: Oklahoma Tax Commission,— (Serve Chairman of Oklahoma Tax Commission) requiring said Defendant to answer on or before the 30th day of December, 1942 and returnable on the 10th day of December, 1942, and you will endorse thereon, suit brought for recovery of taxes paid under protest and unless said Defendant answers, judgment will be taken for the sum of \$3,931.92 with interest at three per cent per annum from the 30th day of October, 1942.

Dated November 30, 1942.

(Signed) Ames, Monnet, Hayes & Brown, Attorneyfor Plaintiff.

[File endorsement omitted.]

[fol. 40] IN THE DISTRICT COURT OF OKLAHOMA COUNTY.

SUMMONS AND RETURN-Filed December 2, 1942

The State of Oklahoma to the Sheriff of Oklahoma County, in Said State—Greetings:

You are hereby commanded to notify the defendant Oklahoma Tax Commission that it has been sued by The Texas Company, a corporation, In the District Court sitting in and for said County of Oklahoma, and unless it answers by the 30th day of December, 1942, the petition of said plaintiff against said defendant filed in the District Court, such petition will be taken as true and judgment rendered accordingly.

You will make due return on this summons on the 10th day of December, A. D. 1942.

Witness my hand and seal of said court, affixed at my office in Oklahoma City, Oklahoma, this 30th day of November, 1942.

Cliff Myers, Court Clerk, (Signed) by Elmo McCallister, Deputy. (Seal.)

[fol. 41] Suit Brought For recovery of taxes paid under protest in the sum of \$3,931.92 with interest at 3% from October 30, 1942.

If defendant — fail — to answer, judgment will be taken for the sum of \$——, with interest at the rate of — per centum per annum from the — day of ——— 19—, and an attorney fee of \$—— and cost of suit.

Cliff Myers, Court Clerk, (Signed) by Elmo McCallister, Deputy. (Seal.)

Sheriff's Return

STATE OF OKLAHOMA,
Oklahoma County, sst

Received this Writ this 30 day of Nov. 1942, and executed the same in my County by serving the within named defendant, as follows, to-wit: Oklahoma Tax Commission on the 30th day of Nov. 1942, by delivering a true and correct copy hereof, with endorsements thereon, to J. D. Dunn, he being the Chairman of the Oklahoma Tax Commission of the State of Oklahoma.

MANUEL Z..... A. D., 19. 372., before me, the undereigned, a Retary Public in and by the Church and thate advented, personally appeared. Fills Malbelletta. Col. of this is identical person..... who executed the within and foregoing instrument by.... Albert Clerk al of office the day and year last above written.

29

Dated the 30th day of Nov. 1942.

George Goff, Sheriff, (Signed) by Chas. N. Sanders,

Deputy

[fol. 42] [File endorsement omitted.]

[fol. 43] IN THE DISTRICT COURT IN AND FOR OKLAHOMA

[Title omitted]

Demurrer-Filed December 29, 1942

1

Comes now the above named defendant and demurs to plaintiff's first cause of action in his petition alleged, and for grounds of such demurrer, says:

That the first cause of action of said petition shows upon its face that it does not state facts sufficient to constitute cause of action in favor of the plaintiff and against the defendant.

Wherefore, defendant prays judgment of the Court.

Comes now the above named defendant and demurs to plaintiff's second cause of action in its petition alleged, and for grounds of such demurrer, says:

That the second cause of action in said petition alleged shows upon its face that it does not state facts sufficient to [fol. 44] constitute cause of action in favor of plaintiff and against defendant.

Wherefore, Defendant prays judgment of the Court.
(Signed) W. A. Barnett, (Typed) W. A. Barnett,
(Signed) A. L. Herr, (Typed) A. L. Herr, Attorneys for Defendant.

[File endorsement omitted.]

[fols. 45-46] (Caption and appearances, Jan. 18, 1945, omitted in printing.)

[fol. 47] (Before the presentation of the Demurrer, the plaintiff asked and was given leave to file an "Amendment to Petition"; a true and correct copy of the same being as follows.)

IN THE DISTRICT COURT IN AND FOR OKLAHOMA COUNTY

[Title omitted]

AMENDMENT TO PETITION—Filed January 18, 1945

Comes now The Texas Company, a Corporation, plaintiff in the above styled cause, and leave of Court being first had and obtained, files this its amendment to its petition heretofore filed herein, and by way of such amendment to its First and Second Causes of Action in said petition contained, in addition to the matters and things therein set out, and not in lieu thereof, alleges and says:

15a. That during all of the time set out in said petition the said lands covered by said leases were, and, except as to the interests as to which supervision has been released as set out in said petition, still are restricted Indian lands of restricted members of the Kiowa and Apache Indian Tribes, respectively, and are tribal lands of said Indian tribes, and the title to which remained and remains in the [fol. 48] United States of America, in trust for the respective restricted Indian Allottees to which said lands were respectively allotted, and were and are subject to the supervision and control of the United States of America; and that said oil and gas leases covering said lands likewise were and are, except to the extent as to which supervision has been released, as aforesaid, subject to the supervision and control of the United States of America.

15b. That insofar as said taxing statutes referred to in said petition are held to impose either such gross production taxes or such "proration taxes" upon oil produced by plaintiff from any of said lands, as set out, such statutes, and each of them, were and are illegal and void for the reason that they and each of them constitute an interference with or an imposed servitude upon a lawful commercial enterprise with restricted Indians, over which the Congress of the United States has absolute control, and are in conflict with and violative of Article 1, Section 8 of the Constitu-

tion of the United States which confers upon Congress the exclusive power and jurisdiction to regulate commerce with the Indian Tribes.

15c. That in addition to the above, insofar as said taxing statutes are held to impose either such gross production taxes or such "proration taxes" upon oil produced by plaintiff from any said lands, as set out, such statutes, and each of them, were and are illegal and void for the reason that. they, and each of such statutes, and the taxes thereby imposed, constitute a substantial and exhorbitant burden and [fol. 49] hindrance upon an agency or instrumentality of the United States Government, namely, the plaintiff's said oil and gas leases, and each of them, and the Congress of the .United States of America in the discharge of its duties and obligations as guardian of said Indian Wards, and this plaintiff as lessee under said leases in the performance of its duties and obligations as such lessee; and further that such statutes and such taxes so imposed materially and substantially interfere with, impair and hinder the usefulness and efficiency of such agencies or instrumentalities, and each of them, in serving said United States Government as they were intended to serve it.

Wherefore, its petition and this its amendment thereto considered, plaintiff prays that it have judgment herein against the defendant, Oklahoma Tax Commission, as prayed for in its said petition on file herein, and that it have such other, further and general relief as it may be entitled to receive by law or in equity in the premises.

(S.) John R. Ramsey, B. W. Griffith, Ames, Monnet, Hayes & Brown, Attorneys for Plaintiff, The Texas Company.

[fol. 50] [File endorsement-omitted.]

.

[fol. 51] IN THE DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

MINUTE ENTRY OF HEARING

1945:

Jan. 18, Ent.: Comes on for hearing on Demurrer. Plaintiff granted leave to file Amendment to petition. Okla. Tax Commission granted leave to re-file Demurrer to Amendment to Petition heretofore. Comes on for hearing on Demurrer; argued by counsel and passed until Jan. 25, 1945.

Babcock.

[fols. 52-53] (Caption and appearances, Jan. 25, 1945, omitted in printing.)

[fol. 54] IN THE DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

MINUTE ENTRY OF JUDGMENT-January 25, 1945

Ent.: Comes on for decision of the Court. Demurrer sustained; Exc. allowed. Plaintiff refuses to plead further and Plaintiff's Petition dismissed. Plaintiff gives Notice of Appeal to Supreme Court; time to make and serve Case-Made extended 30 days; with 3 days to suggest amendments; with 3 days for either party to sign and settle same. Clerk directed to note same on Trial Docket.

Babcock.

[101.55] IN THE DISTRICT COURT IN AND FOR OKLAHOMA COUNTY, STATE OF OKLAHOMA

No. 106,796

THE TEXAS COMPANY, a Corporation, Plaintiff,

VS.

OKLAHOMA TAX COMMISSION, Defendant

JOURNAL ENTRY OF JUDGMENT-Filed February 12, 1945

Now, on this, the 18th day of January, 1945, the above styled case came on to be heard on the demurrer of the defendant to the petition of the plaintiff; and the plaintiff, The Texas Company, a corporation, appeared by its attorneys, Ames, Monnet, Haves & Brown and B. W. Griffith; and the defendant, Oklahoma Tax Commission, appeared by its attorneys, A. L. Herr and C. W. King; and, thereupon, the plaintiff requested permission to file its Amendment to its petition herein, and there being no objection thereto, permission was granted the plaintiff to file said amendment to its petition on file herein, and said amendment to petition was filed instanter; and, thereupon, the defendant requested permission to refile its said demurrer, heretofore filed herein, to the plaintiff's petition and to said [fod. 56] amendment to said petition, and there being no objection thereto, the court granted the defendant permission to refile as demurrer and ordered that said demurrer be considered as refiled to said perition and to said amendment thereto and ordered that said demurrer be refiled instanters which was accordingly done.

Thereupon, the demurrer of said defendant to the plaintiff's said petition and said amendment thereto was presented to the court, and the court having heard and considered the argument of counsel, took said demurrer under advisement and continued this cause until the 25th day of January, 1945, for an adjudication upon said demurrer; and now, on this, the 25th day of January, 1945, this cause came on for a decision and adjudication by the court upon the said demurrer of the defendant; and the parties appeared by their respective counsel, as above set forth; and, thereupon, the court having fully considered this matter, finds and orders that the said demurrer of the defendant to the

petition of the plaintiff and to the amendment to said petition should be and the same is hereby sustained, both as to the plaintiff's first cause of action and as to the plaintiff's second cause of action to which action of the court in sustaining said demurrer the plaintiff excepts as to each of its causes of action and exceptions are by the court allowed. Thereupon, the plaintiff, in open court, announced that it elected to stand upon its said petition and its said amendment to said petition and refused to plead further. There-[fol. 57] upon, the court ordered that the said petition of the plaintiff and said amendment thereto be and the same are hereby dismissed and further ordered that judgment be rendered herein in facor of the defendant and against the plaintiff, to all of which the plaintiff duly excepted, and exceptions were by the court allowed.

It is therefore by the court ordered, adjudged and decreed that said demurrer of the defendant to the petition of the plaintiff and the amendment thereto, on file herein, be and the same is hereby sustained and that the said petition of the plaintiff and said amendment thereto be and the same are hereby dismissed, and that said defendant, The Texas Company, that said plaintiff ander either of the plaintiff's said causes of action, and that the defendant go hence without day with its costs herein; to all of which the plaintiff excepted, and exceptions were by the court allowed.

Thereupon, the plaintiff gave notice in open court of its intention to appeal to the Supreme Court of Oklahoma from the order of the court in sustaining the said demurrer of the defendant to the petition of the plaintiff and to the amendment to said petition and from the order and judgment of the court in dismissing the said petition of the plaintiff and said amendment to said petition and in rendering [fol. 58] judgment in favor of the defendant and against the plaintiff, as above set out, and requested that notice of its said intention so as to appeal to the Supreme Court of Oklahoma be entered by the court clerk of Oklahoma County, Oklahoma, on the clerk's minutes and on the trial docket of said court, as provided by law; and thereupon the court ordered and directed that entry of said notice of appeal be made in accordance with such request.

And, it appearing to the court that the time allowed by law is insufficient within which to make and serve a casemade on appeal to the Supreme Court herein, it is hereby ordered that said plaintiff, The Texas Company, be allowed an extension of thirty (30) days in addition to the time provided by law, and, namely, until and including the 11th day of March, 1945, to make and serve a case-made on appeal to the Supreme Court in said cause, the defendant, Oklahoma Tax Commission, to have three days thereafter within which to suggest amendments to said case-made and the same to be signed and settled upon there (3) days; notice, in writing, by either party to the opposite party.

It Is Further Ordered that said plaintiff be and it is allowed until and including the 25th day of July, 1945, within which to file its petition in error, or proceedings in error, on appeal, in the Supreme Court of Oklahoma in this case. O. K. as to form:

(Signed) John R. Ramsey and B. W. Griffith, [fol. 59] Ames, Monnet, Hayes & Brown Attorneys for Plaintiff, The Texas Company.

. O.K.

(Signed) C. W. King, Attorneys for Defendant, Oklahoma Tax Commission. (Signed) Lucius Babcock, Judge of District Court.

. [File endorsement omitted.]

[fol. 60] [Statement as to contents of case-made omitted in printing]

[fol. 61] [Certificate of Attorneys omitted in printing]

[fel. 62] [Acknowledgment of service of transcript and case-made omitted in printing]

[fol. 63] [Notice of settlement of franscript and casemade omitted in printing]

[fols. 64-65] [Stipulation of Attorneys omitted in printing]

[fols. 66-67] Reporter's Certificates to foregoing transcript omitted in printing.

[fol. 68] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 69] IN THE DISTRICT COURT ON OKLAHOMA COUNTY

[Title omitted]

CERTIFICATE OF TRIAL JUDGE

STATE OF OKLAHOMA,

County of Oklahoma, ss.:

I, The undersigned Judge of The District Court of Oklahoma County, Oklahoma and within the Seventh Judicial District of the State of Oklahoma and the Trial Judge of the above entitled cause, do hereby certify that the above and foregoing was presented to me as a Transcript and Case-Made in the above entitled cause and due and legal service of the same having been made upon the attorneys of record for the above named defendant, as shown on the Acknowledgment of Service on Page 57 herein; and the attorneys for the plaintiff and the attorneys for the defendant having stipulated, as shown in the Stipulation of Attorneys on Page 59 and Page 60 herein, that the above and foregoing. is a full, true, correct and complete Transcript and Case-Made herein and having waived the suggestion of amendments and stipulated that said Transcript and Case-Made should be signed by me immediately and without Notice; [fol. 70] the same being a full, true, correct and complete Transcript and Case-Made, I now settle and sign the same. as a full, true, correct and complete Transcript and Case-Made: and direct that it be attested and filed by the Clerk of said Court, according to law.

And the said plaintiff herein, to-wit: The Texas Company, a Corporation, is hereby granted permission to withdraw the same, after it has been attested and filed by the Clerk of said Court, for the purpose of attaching the same to its Petition in Error on Appeal to The Supreme Court of the State of Oklahoma.

Witness my hand, in Chambers, in the City of Oklahoma City, Oklahoma County, State of Oklahoma, on this, the 29 day of March, 1945.

Lewis Babcock, District Judge.

Attest: Cliff Myers, Court Clerk of Oklahoma County, State of Oklahoma, by W. H. Regean, Deputy, (Seal.)

Filed In Supreme Court of Oklahoma, Jul. 19, 1945. Vivian S. Payne, Clerk.

[fol. 71] IN THE SUPREME COURT OF OKLAHOMA

No. 32,270

THE TEXAS COMPANY, a Corporation, Plaintiff in Error,

VS.

OKLAHOMA TAX COMMISSION, Defendant in Seror

Syllabus

1. A lessee producing oil from lands of restricted Kiowa and Apache Indians under departmental lease approved by and subject to supervision of the Secretary of the Interior of the United States, is engaged in the operation of a governmental instrumentality or agency and in the absence of permissive legislation by Congress, or appropriate Federal consent or waiver or withdrawal of immunity, the oil production or the oil is produced is not subject to the state excise tax of one-eighth of one cent per barrel, nor the state gross production tax of five per cent of the value of the oil produced.

Appeal from the District Court of Oklahoma County. Hon.
Lucius Babcock, Judge

[fol. 72] Action by the Texas Company, a corporation, against the Oklahoma Tax Commission to recover certain oil excise taxes and gross production taxes paid under protest of illegality. From an order sustaining demurrer to plaintiff's petition and rendering judgment for defendant, the plaintiff appeals.

Reversed.

Amos, Monnet, Hayes and Brown of Oklahoma City, Okla. Y. A. Land, John R. Ramsey, B. W. Griffity, al of Tulsa, Okla., for Plaintiff in Error.

E. L. Mitchell and C. W. King of Oklahoma City, Okla., for Defendant in Error.

Opinion—Filed September 23, 1947

Welch, J.:

This action tests the validity of certain state tax assessments, gross production and oil excise tax, made against the Texas Company for oil production, under departmental

leases on restricted lands of Kiowa and Apache Indians. [fol. 73] The plaintiff, hereinafter referred to as "Company," paid the taxes under protest to the Oklahoma Tax Commission, (hereinafter referred to as "Commission,") and sued for recovery back. Plaintiff claimed there was legal immunity from such taxes because in the operation of such leases and in the production of such oil, "Company" was an instrumentality of the federal government.

That such a lease is an instrumentality of the federal government has been held in many cases hereinafter cited. Among the first such cases, if not the first, was Indian Territory Illuminating Oil Company v. Oklahoma, 240 U.S.

a 522, 60 L. ed. 779.

As applied to a gross production tax on oil, the exact contention of "Company?" of immunity from such tax was sustained in Large Oil Co. v. Howard, 248 U. S. 549, 63 L. ed. 416, and in Howard v. Gypsy Oil Co., 247 K. S. 504, 62 L. ed 1239.

And the United States Congress has acted on the theory that such immunity exists in the case of leases of this character unless waived. The Congress has adopted acts expressly waiving such immunity and granting to this State the authority to apply the gross production tax as to certain designated Indian lands, the Osage Indian Lands by act in 1921 (41 Stat. at L. 1250), the Kaw Indian Lands [fol. 74] by act in 1924 (43 Stat. at L. 176-177), and as to lands of the Five Civilized Tribes by act in 1928 (43 Stat. at L. 496.)

As applied to the oil excise tax the exact contention of immunity from such tax here made by "Company" has been sustained by this court in Barnsdall Refineries Inc., v. Oklahoma Tax Commission, 171 Okla, 145, 145 P. (2d) 918, affirmed in Oklahoma v. Barnsdall, 296 U. S. 521, 80 L. ed. 366.

Thus it has been established and for many years recognized in this court, in the Congress and in the Supreme Court of the United States, that in the case of such leases neither of the taxes here involved may be imposed without waiver, of immunity or permissive legislation by the Congress.

But the "Commission" contends that, in foundation, the above rule rests upon other and former decisions of the Supreme Court of the United States dealing generally with the "governmental instrumentality" rule, and that ell such former decisions as well as those heretofore check were in effect overruled in Helvering v. Mountain Producers Corp., 303 U. S. 376, 82 L. ed. 907.

Upon consideration of that point we observe the Mountain Producers case relates to income tax assessed against the net income or personal profit earned by a lessee in a position

[fol. 75] similar to that of "Company".

Long prior to the Mountain Producers case that court had extended the governmental instrumentality rule to include such personal income or profit within the tax immunity, and had held that income tax could not be assessed against such an oil and gas lessee. See Gillespie v. Oklahoma, 257 U. S. 501, 66 L. ed. 338, and Burnett v. Coronado Oil and Gas Co., 285 U. S. 393 76 L. ed. 815.

The decision in the Mountain Producers cases was a reconsideration of that exact income tax question, and in the latter case that court held that such extension of the governmental instrumentality rule was without adequate foundation or support, and that court expressly overruled the two former decisions, the Gillespie case and the Burnett case, and expressly held in the Mountain Producers case that the income tax might properly be assessed.

While that court thus specifically restricted the limits of the governmental instrumentality rule to that extent, we do not find in that decision any abolition of the rule, or any further departure from former application of the rule than

is specifically made in and by that decision.

[fol. 76] The Mountain Producers case specifically overruled the two former income tax cases mentioned, but did not expressly overrule either of the gross production (ax cases above cited nor the Barnsdall case, supra, nor indicate any specific intention of so doing:

It is the view of the writer of this opinion, speaking for himself alone, that for the reasons pointed out in the briefs one might well join in the request that the Supreme Court of the United States reconsider this question as applied to a tax on the oil as it did reconsider the question as applied to the tax on the personal income or net profit of the oil producer, which consideration resulted in a reversal of the rule as to such income tax as we have noted. But it is thought beyond the power of this court to now engage in such reconsideration, in view of the cited decisions of the

higher authority which thus far wholly sustain the claim of "Company" to immunity from the tax here involved.

Upon questions of federal law, citizens and their attorneys have the fight to rely upon decisions of the Supreme Court of the United States, and upon such questions it is our fixed duty to follow such decisions, leaving to the United States Congress or Supreme Court the making of the necessary changes in such legal rules.

[fol. 77] In a later case, United States v. County of Allegheny, 322 U.S. 174, 88 L. ed. 1209, the Supreme Court of the United States recognized that in the Mountain Producers case the rule of implied immunity had been "sharply curtailed," but that is not to say an abolition of the rule, but a limitation or curtailment thereof, definitely leaving the balance thereof in full force.

Other authorities are cited to support the view of "Commission" as to the implied or extended effect to be given the Mountain Producers decision. We have considered them but find further discussion of them not necessary, other than to say that we cannot construe the decision in the Mountain Producers case to go to the extent contended for.

We regard the decisions of the Supreme Court of the United States, supra, as binding upon us, and in view thereof the plaintiff's petition stated a cause of action. It was error to sustain a demurrer thereto.

The judgment for defendant is reversed, with directions to overrule the demurrer to plaintiff's petition and proceed consistent with the views here expressed.

Hurst, C. J.; Davison, V. C. J.; Riley, Gibson and Luttrell, JJ., Concur.

Corn, J. dissents.

[fol. 78] · [File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION FOR REHEARING-Filed October 6, 1947.

Comes now the Oklahoma Tax Commission, defendant in error, and respectfully represents to the court that on the

23rd day of September, 1947, a decree and judgment was rendered by this Court in said cause holding:

"1. A lessee producing oil from lands of restricted Kiowa and Apache Indians under departmental lease approved by and subject to supervision of the Secretary of the Interior of the United States, is engaged in the operation of a governmental instrumentality or agency and in the absence of permissive legislation by Congress, or appropriate Federal consent or waiver or withdrawal of immunity, the oil production or the oil as produced is not subject to the state excise tax of one-leighth of one cent per barrel, nor the state gross pro[fol. 79] duction tax of five per cent of the value of the oil produced,"

(1) That said decision overlooked a question decisive of ... the case, and duly submitted by counsel as follows:

That in order for a burden on an instrumentality of the Government to inhibit the collection of a uniform tax, such burden must be direct and substantial and actually hinder the operation of functions of the State Government in the performance of its duties.

- (2) That said decision is in conflict with the law, both State and Federal, to which the attention of the Court has not been called, either in brief or oral argument, or which has been overlooked by the court to the effect that theoretical burdens or governmental instrumentalities or agencies are no longer recognized by the Supreme Court of the United States to the extent that same prevents a state from levying and collecting the ordinary tax applying to other like persons.
- (3) That the said decision is erroneous in that it wrongfully and unlawfully deprives the State of Oklahoma of the exercise of the highest sovereign power, that of the power to raise revenues for the support of the state government which said power is supreme and cannot be impinged, cur-[fol. 80] tailed or denied to the sovereign state on account of the laws, rules, regulations or other processes of the federal government. The court overlooked the fact that oil companies pay the same price for restricted leases for the production of oil, gas and other minerals in the State of

Oklahoma that is paid for nonrestricted leases, and therefore, the Indian, the ward of the government, is not penalized by the oil or gas developing contract or lease because of his restrictions. In most instances, as this court knows from common knowledge, the oil leases are initially bought by brokers or oil scouts depending solely upon the oil producing expectancy and at the time they are bought and the purchase price is made, it is not known whether or not a given lease is taxable or non-taxable and therefore, the identical consideration for the annual lease money or bonus is paid for the lease on the restricted area as on the non-restricted tract.

Wherefore, defendant in error prays that a rehearing of said cause may be granted by this Honorable Court and that the same be set down for oral argument and permission given to resubmit the questions involved to the considera[fol. 81] tion of the Court; that upon such consideration, the case be reversed.

Mac Q. Williamson, Attorney General; Fred Hansen, First Assistant Attorney General; C. W. King, General Counsel, Oklahoma Tax Commission, Attorneys for Defendant in Error.

[fol. 82]o

AFFIDAVIT OF MAILING

STATE OF OKLAHOMA,

Oklahoma County, ss: 🏐

Lucile Williams being duly sworn on oath, deposes and says that on the 6th day of October 1947, she enclosed a copy of the attached Petition for Rehearing in an envelope addressed to: Ames, Monnet, Hayes and Brown, Attorneys at Law, First National Building, Oklahoma City, Oklahoma, with postage thereon fully prepaid, and deposited the same in the United States post office at the State Capitol, in Oklahoma City, Oklahoma.

Lucile Williams.

[fol. 83] Subscribed and sworn to before me this 6th day of October, 1947. Effa Alexander, Notary Public. My Commission Expires October 28, 1948. (Seal.) [fol. 83a].

.[File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

ORDER DENATING PETITION FOR REHEARING—Filed January 27, 1948

The clark is hereby directed to enter the following orders:

32270 The Texas Company v. Oklahoma Tax Commissions Petition for Rehearing is denied:

Thurman S. Hurst, Chief Justice.

[fol: 84]

[File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA

[Title omitted]

Medion for Final Decision, etc.—Filed November 25, 1947

Comes now the defendant in error, Oklahoma Tax Commission, and shows to the court that this action is ruled by one question of law and which is based on a fact status

which is not in controversy.

The plaintiff, The Texas Company, in its petition and briefs allege as a matter of fact that the oil and gas mining leases set out in said petition are what are commonly known and recognized as departmental leases executed under the supervision and according to rules and regulations promulgated by the Secretary of the Interior; that the lands or lease holds from which the oil and gas defined in plaintiff's petition were produced, are restricted Indian lands within the definition and meaning of that term as used by the oil industry and the United States Department of Interior. That the allegations of fact of plaintiff's petition with reference to the restricted nature of the oil and gas leases involved are not denied by the Oklahoma Tax Commission.

[fol. 85] The defendant in error, Oklahoma Tax Commission (without prejudice to its petition for rehearing on file

sion (without prejudice to its petition for rehearing on file in this court) therefore, moves the court that should a rehearing not be granted and the present opinion of the court adherred to, that the opinion be so modified that it will not be remanded to the District Court for a further trial and fresh judgment which said second judgment would likely be appealed to this court and a long period of time would be vainly consumed and the energy of both counsel and the courts uselessly occupied in such proceeding, that in lieu thereof, this court do find the facts as herein admitted and render a final judgment from which an appeal can be prosecuted to the Supreme Court of the U.S. directly from the decision of this court.

It is, of course, the contention of the defendant in error, Oklahoma Tax Commission, that the restrictions upon alienation of the land by the Indian owner do not operate to render the proceeds from the sale of oil and gas from such leases immune or exempt to the Texas Company, lessee and operator from the payment of the gross production taxes of 5% which said taxes are in lieu of ad valorem taxes on the oil and gas produced, the lease hold and appliances employed in the production of said oil and gas, and that this motion shall not be construed to contain any admission which prevents the defendant in error from thoroughly presenting all matters other than the question of fact herein admitted and is without prejudice to plaintiff's presentation of the legal question involved, to wit: The taxability of the oil and gas produced from the leases in question.

[fol. 86] Oklahoma Tax Commission, by Mac Q. Wilhanson, Attorney General; Fred Hansen, First Asst. Attorney General; C. W. King, General Coun-

el for Oklahoma Tax Commission.

C. W. King, being first duly sworn says that on the 24th day of November, 1947, he served a copy of this motion on the attorney of record, B. W. Griffith, Legal Department of the Texas Company, Tulsa, Oklahoma, by mailing him properly addressed, postage prepaid a true copy of said motion.

C. W. King, General Counsel.

Subscribed and sworn to before me this 24 day of November, 1947. Effa Alexander, Notary Public. My Commission expires 10-28-48. (Seal.) [fol. 87]

[File endorsement: omitted]

IN THE SUPREME COURT OF OKLAHOMA

No. 32,270

THE TEXAS COMPANY, a Corporation, Plaintiff in Error,

VS.

OKLAHOMA TAX COMMISSION, Defendant in Error

ORDER CORRECTING OPINION—Filed January 22, 1948

ber 23, 1947, be, and the same is corrected in the following two particulars, to-wit:

- I. That on the Caption Sheet the word "Reversed" is stricken and in lieu thereof the following words are inserted, to-wit: "Trial Court Judgment for Defendant Reversed and Judgment Rendered for Plaintiff."
- II. The last paragraph of the opinion is hereby stricken and in lieu thereof the following paragraph is inserted towit:

[fol, 88] "The trial court judgment for defendant in reversed.

And since there is no question as to the aforesaid facts, which are alleged by plaintiff and admitted by defendant, final judgment is hereby rendered for plaintiff and against the defendant for the sum sued for. The cause is remanded with directions to the trial court that such judgment be duly entered of record."

Done by order of the Court in conference this 22 day of January, 1948.

Thurman S. Hurst, Chief Justice.

[fot. 89]

[File endorsement omitted]

IN THE SUPREME COURT OF ORLANDMA

[Title omitted]

MOTION FOR ORDER STAYING MANDATE—Filed Jahuary 29, 1948

Comes now the defendant in error, Oklahoma Tax Commission, in the above entitled cause, and respectfully shows to the court that defendant in error desires to appeal to the Supreme Court of the United States from the decision of this court rendered herein on the 22nd day of January, 1948, and from order overruling petition for rehearing entered January 27, 1948, and that said defendant in error, Oklahoma Tax Commission; desires that the mandate in said cause be stayed pending such appeal.

Wherefore, defendant in error, Oklahoma Tax Commission, prays the court to enter an order herein staying the mandate in said above styled cause pending the appeal herein of defendant in error to the Supreme Court of the United States.

Mac Q. Williamson, Attorney General; Fred Hansen, Assistant Attorney General? C. W. King, General Counsel for Oklahoma Tax Commission, Attorneys for Defendant in Error.

[fol. 90].

AFFIDAVIT OF MAILING

STATE OF OKLAHOMA,

Oklahoma County, ss:

C. W. King, being first duly sworn upon his oath states that he is one of the attorneys for the above named defendant in error; that on January 29, 1948, he enclosed a copy of the above Motion to Stay Mandate in an envelope addressed to Mr. B. W. Griffith, one of the attorneys for the above named plaintiff in error, at his office in care of the Legal Division of the Texas Company, Philtower Building, Tulsa, Oklahoma, and deposited the same, with postage

thereon paid, in the United States Post Office at Oklahoma.

C. W. King.

Subscribed and sworn to before me this 29th day of January, 1948. Ann Fannier Notary Public. My Commission Expires: Apr. 8, 1950. (Seal.)

[fol. 91] [File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA

ORDER STAYING MANDATE-Filed February 10, 1948

The Clerk is hereby directed to enter the following orders;

32-270-The Texas Co. v. Oklahoma Tax Commission.

32,678—Magnolia Petroleum Co. v. Oklahoma Tax Commission.

Ordered that mandate in the above styled causes be stayed until April 29, 1948, pending appeal to the U. S. Supreme Court, and thereafter until Final disposition by that Court if appeals are perfected within time allowed.

Thurman S. Hurst, Chief Justice.

[fol. 92]

[File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL AND PRAYER FOR REVERSAL—Filed February 18, 1948

To the Honorable Chief Justice of the Supreme Court of the State of Oklahoma:

Your appellant in the above entitled cause, and appellees and defendant in error in the cause in the Supreme Court of Oklahoma, hereinafter referred to, considering themselves aggrieved by the final decision and judgment of the Supreme Court of Oklahoma, entered on the 23rd day of September, 1947, (motion for modification having been filed on November 25, 1947, an order correcting opinion on January 22, 1948, and petition for rehearing being denied January 27, 1948, motion to stay mandate dated January 29, 1948, and order staying mandate pending appeal to the United States Supreme Court dated January 29, 1948,) which said judgment became final upon the overruling of petition for rehearing on the 27th day of January, 1948, in the cause entitled:

"The Texas Company, a corporation, plaintiff in error, vs. Oklahoma Tax Commission, defendant in error, No. 32270,"

[fol. 93] on the docket of said court, reversing the order and judgment of the District Court of Oklahoma County, Oklahoma, hereby file its petition for an appeal from said decision and judgment to the Supreme Court of the United States.

In the above entitled cause in the Supreme Court of Okla homa there is drawn in question the validity of statutes of the State of Oklahoma, to-wit: Sections 821 to 843 inclusive, Ch. 20, Title 68, Okla. Stat. 1941, as amended by Ch. 20, 1947, Supl. to Stat. 1941, on the ground of said statutes being invalid as applied to the plaintiff inserror below and the appellee herein and in violation of the Acts of Congress, which the appellee urged operated to make exempt and immune production of oil and gas from restricted Indian leases, particularly the General Allotment Act of the United States of America, approved February 8, 1887, Chapter 119, 24 Statute, 388 and Acts amendatory thereof, and the Act of Congress March 3, 1935, Ch. 781 and 783, that the said 7/8 working interest of the Texas Company, lessee of restricted Indian lands, was immune from taxation by the State of Oklahoma and that the state's efforts to collect a gross production tax from said lessee, the Texas Company, was in violation of the 14th Amendment of the Constitution of the United States of America in that said leases constituted an instrumentality of the Government of the United States and were, therefore, exempt and immune from state [fol. 94] taxation. The judgment and decision of the Supreme Court of Oklahoma sustained said position of the taxpayer and held said tax invalid in contravention of the Acts of Congress as interpreted by the decision of this court and such decision operated to deprive the State of Okla-

homa as represented by the Oklahoma Tax Commission as its officers and agents, of the right to levy and collect the gross production tax on oil and gas derived from the operation of the said Texas Company, lessee, from the restricted Indian oil lands which said decision denied to the State of Oklahonia and the appellant herein, its sovereign rights guaranteed under the Enabling Act admitting the State of Oklahoma to statehood and the provisions of the State Constitution of Oklahoma, adopted pursuant thereto, and violates the rights of the State of Oklahoma as guaranteed under the Constitution of the United States in that it deprives the State of Oklahoma of its sovereign power of . taxation as related to the subject matter of this litigation; that said decision is repugnant to treaties and laws of the · United States relating to the Osage Tribe of Indians and should be reviewed by this court on appeal.

The decision and final judgment of the Supreme Court of Oklahoma herein appealed from, were in favor of the validity of the said Statute of the State of Oklahoma as applied to the oil and gas produced from restricted Indian

lands by the Texas Company as lessee.

[fol. 95]. The Supreme Court of Oklahoma is the highest court of the State of Oklahoma in which a decision of the suit could be had.

Appellant shows that this case is one in which under the legislation in force to-wit: Sec. 237(a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U.S.C. Secs. 344(a), and 861(a), a review may be made in this court as a matter of right by appeal.

This appeal is accompanied by an assignment of errors setting forth the grounds that the decision and judgment of the Supreme Court of Oklahoma should be reversed and a statement particularly disclosing the basis on which it is contended that the Supreme Court of the United States has jurisdiction to review said decision and judgment of the Supreme Court of Oklahoma.

Wherefore, your appellant prays that an appeal may be allowed herein from the Supreme Court of Oklahoma to the Supreme Court of the United States in order that said decision and judgment of the Supreme Court of Oklahoma may be examined and reversed; that a transcript of the material part of the record in said cause, duly authenticated, may be

ordered to be prepared and certified to the Supreme Court of the United States as provided by law; that an order may be made fixing the security to be required of appellant (or excepting appellant from such requirement on the ground that this is a suit for and on behalf of the State of Okla-[fol. 96] homa); that such security for cost as may be required in lieu of bond and tendered herewith may be approved; and that there be issued to appellee a citation directing said appellee to appear in the Supreme Court of the United States at Washington, D. C., within forty days from the date hereof and there show cause, if any there be, why said decision and judgment should not be reversed and a speedy justice be done the parties in that behalf.

Mac Q. Williams, Attorney General; Fred Hansen, Asst. Attorney General; C. W. King, General Coun-

sel, Oklahoma Tax Commission.

STATE OF OKLAHOMA,

· Oklahoma County, ss:

Service of the foregoing petition for appeal was made upon counsel of record for the Texas Company, plaintiff in error herein and appellee in this appeal by depositing in the United States Post Office at Oklahoma City, postage prepaid, a copy of this petition clearly addressed to said counsel to-wit: B. W. Griffith, Legal Division, Texas Company, Philtower Building, Tulsa, Oklahoma, on this 18 day of February, 1948.

C. W. King.

Subscribed and sworn to before me the undersigned notary public this 18 day of February, 1948. M. V. Kloffenstein, Notary Public. My commission expires: Feb. 11, 1951. (Seal.)

[fol. 97] [File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

Assignment of Errors—Filed February 18, 1948

The appellant, Oklahoma Tax Commission, for its assignment of error herein says that the Supreme Court of Okla-

homa in its decision and judgment in the cause entitled: "The Texas Company, a corporation, plaintiff in error, vs. Oklahoma Tax Commission, defendant in error, No. 32270," erred in its order and decision reversing the judgment of the District Court of Oklahoma County, Oklahoma, in case No. 106796, wherein the trial court sustained the demurrer of the Oklahoma Tax Commission against the petition of the plaintiff, Texas Company, seeking to recover the gross production taxes paid under protest.

Upon review of such order and judgment of the Oklahoma District Court, the Supreme Court of Oklahoma erred in each of the following particulars and in each particular, appellant was deprived of its just rights on behalf of the State of Oklahoma and was denied the exercise of the sovereign powers of taxation guaranteed under the Consti-

tution of the United States:

[fol. 98] (1) The Supreme Court of Oklahoma erred in reversing the order and judgment of the Oklahoma County District Court for the reason that the action of the trial court in holding the Oklahoma Statute levying gross production tax on oil, gas and other minerals did not apply to the 7/8 working interest in the oil and gas produced by the Texas Company and belonging to it for the reason that the said production came from so-called restricted Indian lands.

- (2) Said court erred in reversing the order and judgment of the Oklahoma County District Court for the reason that the United States Government has no title, ownership or property interest in the subject matter of this litigation which renders the levying and the collection of the Oklahoma gross production tax on oil and gas an unlawful burden on any agency or instrumentality of the United States Government in that the levying and collection of said tax in no wise burdens the Government of the United States directly or indirectly.
- (3) The Supreme Court of Oklahoma erred in reversing the said judgment of the District Court of Oklahoma County by holding "A lessee producing oil from lands of restricted Kiowa and Apache Indians under departmental lease approved by and subject to supervision of the Secretary of the Interior of the United States, is engaged in the operation of

a governmental instrumentality or agency and in the absence of permissive legislation by Congress, or appropriate Federal consent or waiver or withdrawal of immunity, the I fol. 991 oil production or the oil as produced is not subject to the state excise tax of one-eighth of one cent per barrel, nor the state gross production tax of five per cent of the value of the oil produced.

- (4) The Supreme Court of the State of Oklahoma erred in reversing the judgment of the Oklahoma County District Court in holding that the departmental leases described in plaintiff's petition constituted such Federal agencies or instrumentalities, the taxing of which would burden the arm of the Federal Government in the administration of the affairs of the Indian and thereby impair his fortune and thereby further weaken the arm of the Federal Government in discharging an obligation to its ward.
- (5) The Supreme Court of Oklahoma erred in refusing to hold upon the urgency of the appellant, Oklahoma Tax Commission, that the Texas Company could not be heard and had no standing in court to maintain an action for the recovery of taxes based upon the theory that to tax the oil company on its oil and gas production from an Indian lease would burden not the Indian nor the oil company but would burden the United States Government by impinging upon the exercise of the government over a federal agency or instrumentality.
- (6) The judgment and decision of the Supreme Court of Oklahoma reversing the judgment of the trial court was erroneous in that it applied the federal instrumentality or federal agency doctrine of inhibition against the State of [fol. 100] Oklahoma and the Oklahoma Tax Commission after all of the cases, both state and federal, so applying such doctrine as to arrest the taxing power of the state in that particular had been either directly or by plain implication overruled by the Supreme Court of the United States.
- (7) The judgment of the Supreme Court of the State of Oklahoma was erroneous and prejudicial and damaging to the interest of the State of Oklahoma and the Oklahoma Tax Commission in that it deprived the state of its sovereign taxing power guaranteed under the treaty of the Louisiana

Purchase and further guaranteed by the Constitution of the United States and for the further reason that the said decision of the Supreme Court of Oklahoma places the State of Oklahoma in a position of inferiority and impotency as compared with the sister states of the union in that to so deprive the State of its sovereign taxing power operates to deprive said State of its admission to and place in the union of the United States on an equal basis with the original thirteen states.

(8) The opinion of the Supreme Court of the State of Oklahoma and its decree were erroneous and prejudicial to the rights of the State of Oklahoma and the Oklahoma Tax-Commission, appellant herein, in that said opinion incorrectly and erroneously construed the Acts of Congress and [fol. 101] the decision of the State and Federal Court, including recent cases of the Supreme Court of the United States, in which the doctrine of federal instrumentality and federal agency has been modified so that in order for a taxpayer to avoid taxes on such ground, it must be shown that the tax in point of fact as opposed to theory actually and substantially burdens the arm of the government of the United States in administering such instrumentality or agency and that it is not enough to merely show that the subject of taxation or object of taxation is comprised of property over which the government is exercising a form of superintendence and supervision.

For each of the errors specified above and because in each of said respects, the said judgment of the Supreme Court of Oklahoma in reversing the order and judgment of the District Court, deprives appellant and the State of Oklahoma of its property without due process of law, and deprives to each protection of the law and denies the exercise of equal sovereign powers with the other states in violation of the treaty of the Louisiana Purchase and the provisions of the Constitution of the United States, and because said judgment violates the General Alfotment Act and the various other Acts of Congress allotting to said Indians involved and properties from which the oil and gas, the subject of taxation involved herein, was produced, and for such reason appellant prays that said decision [fols. 102-110] and judgment be reviewed by the Supreme Court of the United States and be there reversed and judgment rendered in favor of the appellant, Oklahoma Tax Commission, on behalf of the State of Oklahoma.

> Mac Q. Williamson, Attorney General; Fred Hansen, Asst. Attorney General; C. W. King, General Counsel, Oklahoma Tax Commission.

STATE OF OKLAHOMA,

Oklahoma County, ss:

Service of the foregoing assignment of errors was made upon counsel of record for the Texas Company, plaintiff in error herein and appellee in this appeal by depositing in the United States Post Office at Oklahoma City, postage prepaid, a copy of this petition clearly addressed to said counsel to-wit. B. W. Griffith, Legal Division, Texas Company, Philtower Building, Tulsa, Oklahoma, on this 18 day of February, 1948.

C. W. King, General Counsel, Oklahoma Tax Commission,

Subscribed and sworn to before me the undersigned notary public this 18 of February, 1948. M. V. Kloffenstein, Notary Public. My Commission expires: Feb. 11, 1951.

[fol. 111] [File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES

Title omitted]

ORDER ALLOWING APPEAL Filed February 18, 1948

The petition of the Oklahoma Tax Commission for an appeal in the above case (being case No. 32270, styled the Texas Company, a corporation, plaintiff in error, vs. Oklahoma Tax Commission, defendant in error, upon the docket of the Supreme Court of the State of Oklahoma) to the Supreme Court of the United States from the Supreme Court of the State of Oklahoma, and the assignment of error and the jurisdictional statement required by the fules of the Supreme Court of the United States having been filed herewith, and having been presented, and having been considered, together with the record of said cause, it is

[fol. 112] Ordered, that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Oklahoma, as prayed in said petition, and that the Clerk of the Supreme Court of the State of Oklahoma prepare and certify a transcript of the record and proceedings in the above cause and transit to the Supreme Court of the United States so that same shall be delivered to said court within forty days from the date thereof.

And the appellant, having presented to the Chief Justice of the Supreme Court of Oklahoma, good and sufficient security for cost, condition that appellant prosecute such appeal to effect (or having been excepted from the rule requiring security on account of said cause being prosecuted on belialf of the State of Oklahoma) and that if said appellant fails to make their plea good, they shall answer and pay all cost; and said bond or security for cost having been declared unnecessary in this case on account of said case being prosecuted on behalf of the State of Oklahoma in its sovereign capacity, no cost bond or other like security having been deemed necessary, none is required.

The appeal shall operate as a supersedeas, and the mandate of this court is hereby stayed and the effectiveness of the judgment and order appealed from is hereby stayed

pending the final determination of said appeal,

Dated this the 18 day of February, 1948.

Thurman S. Hurst, Chief Justice of the Supreme [fol. 113] Court of Oklahoma. (Seal.)

Attest: Andy Payne, Clerk.

STATE OF OKLAHOMA,
Oklahoma County, 88:

C. W. King of lawful age being first duly sworn deposes and says, that he served the foregoing order upon the counsel of record for the Texas Company, plaintiff in Error, in this court and appellee in the Supreme Court of the United States by depositing in the Post Office at Oklahoma City, with the correct amount of postage thereon, a letter containing a copy of said order correctly addressed to said counsel to-wit: B. W. Griffith, Legal Division, Texas Company, Philtower Building, Tulsa, Oklahoma.

C. W. King. (Seal.)

Subscribed and sworn to before me this 18 day of February, 1948. M. V. Kloffenstem, Notary Publie. My Commission expires: Feb. 11, 1951. (Seal.)

[fols. 114-117] Citation in usual form showing service on B. W. Griffith, filed Feb. 18, 1948, omitted in printing.

[fol. 118] [File endorsement omitted] .

IN THE SUPREME COURT OF OKLAHOMA

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed February 18, 1948.

To the Clerk of the Above Named Court:

You are hereby requested to make a transcript of the record in the above styled and numbered cause to be filed in the Supreme Court of the United States pursuant to an appeal allowed in said cause, and to include in such transcript of the record the following, and no other, papers and exhibits, to-wit:

A full and complete transcript of the record certified to the Supreme Court of Oklahoma by the District Court under date of March 29, 1945, and filed in the Supreme Court of Oklahoma, with petition in error attached, on July 19, 1945, including the following:

[fol. 119] 1: Petition in error, attached in front of page 1.

- 2. Petition of plaintiff in error here—including Exhibit A—with statement that same is typical of like Exhibits B and C.
 - 3. Amendment to plaintiff in error's petition-42-45.
 - 4. Summons and service thereof 35-37.
 - 5. Demurrer to petition as amended-38-39.
 - 6. Journal Entry of Judgment-50-54.
- 7. Statement as to contents of case-made-55.
- 8. Certificate of Attorneys as to true transcript of record—56.

- 9. Stipulations of attorneys as to record-59-60.
- 10. Certificate of Trial Judge-64-65.
- 11. Notice of intention to file suit for recovery of taxes—26-31.
 - 12. Opinion of the Supreme Court pg. -

13. Petition for Rehearing-pg. -.

- 14. Motion of Defendant in Error, Oklahoma Tax Commission, admitting the restricted nature of the property and asking the Supreme Court to render final decision instead of remanding case to lower court for further proceedings.
- 15. Final opinion and Decision of the Supreme Court pg. -
 - 16. Motion for Stay of Mandate-pg. -

17. Order Staying Mandate pg. -.

18. Petition for Appeal and Prayer for Reversal with Proof of Service—pg. —.
[fols. 120-122] 19. Assignment of Errors with Proof of

Service—pg. —.

20. Jurisdictional Statement with Proof of Service—pg. —

21. Order Allowing Appeal with Proof of Service—pg. —.

22. Citation to Appellee with Proof of Service-pg. -

23. Praecipe for Transcript of Record with Proof-pg. -.

24. Statement of Points to be Relied upon, with Proof of Service—pg. —.

25. A full, complete and accurate index of the record required by this praccipe—pg. —

Said transcript to be prepared as required by law and the rules of this Court and the rules of the Supreme Court of the United States; and to be filed in the office of the Clerk of the Supreme Court of the United States on or before the 29th day of April, 1948.

Mac Q. Williamson, Attorney General; Fred Hansen, First Asst. Attorney General; C. W. King, General Counsel, Oklahoma Tax Commission.

[fol. 123] State of Oklahoma, Oklahoma County, ss:

C. W. King of lawful age first being duly sworn deposes and says that he deposited in the Post Office at Oklahoma City, with correct amount of postage thereon, a copy of this Praecipe addressed to B. W. Griffith, Legal Division, Texas Company, Philtower Building, Tulsa, Oklahoma, on this the 21st day of February, 1948.

C. W. King.

Subscribed and sworn to before me this 21 day of February, 1948. M. V. Klopfenstein, Notary Public. My Commission expires Feb. 1. 1951. (Seal.)

[fol. 124] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 125] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED ON-Filed April 10, 1948

In this appeal the appellant, Oklahoma Tax Commission, states that it intends to rely on the following enumerated points:

- 1. The taxes imposed and by appellee protested are: (1) A nondist im-atory gross production tax in an amount equal to five per centum of the gross value of the oil, gas, and casinghead gas produced, but not to exceed what otherwise would be the rate for ad valorem purposes if subjected to that tax, the tax being levied in lieu of all other taxes on the oil, gas, casinghead gas and all appliances, tools and machinery directly used and employed in the production; (2) A nondiscrim-atory excise tax of ½ of ½ per barrel on all oil produced.
- (a) The properties from which the oil and gas was produced lie wholly within the State of Oklahoma and all acts necessary in producing the oil, gas and casinghead gas were performed in Oklahoma.
- der which the taxes were imposed have been sustained by the Supreme Court of Oklahoma. In denying the State of [fol. 126] Oklahoma its inherent sovereign right to impose

and collect the taxes above referred to, on the oil, gas and casinghead gas produced and accoung to the 7/8 working interest of appellee under the departmental leases covering the lands of restricted Indians, including among which lands are lands in which non-Indians owned an undivided interest in the 1/8 royalty interest, the Supreme Court of Oklahoma has violated the inherent sovereign and constitutional rights of the State of Oklahoma as one of the sovereign states of the Union to levy and collect taxes on subjects wholly within her jurisdiction.

- 2. The United States had and held no right, title, interest or ownership in and to the 1/8 working interest held and owned by appellee or in and to the production accruing to said interest. Therefore, an imposing of the taxes in controversy did not constitute a taxing of properties of the United States.
- 3. An imposing of the tax will not burden or effect the property rights of any estricted Indian and his accruals from the oil, gas and casinghead gas produced will neither be lessened nor diminished.
- 4. The fact that appellee operated and produced oil and gas under departmental leases from wells located on the lands of restricted Indians, did not make and constitute it a United States agency or a federal instrumentality. The appellee was a private corporation and its business of operating and producing the oil, gas and casinghead gas was a private business.
- 5. An imposing of the taxes in controversy will not directly burden, interfere with or hinder the United States Government in carrying out its supervisory functions in confol. 127] nection with the properties of any restricted Indian. The effect of imposing the tax, if any, is indirect, inconsequent-al and remote.
- 6. An imposing of the tax will not deprive the appellee of the power to serve the United States Government as it was intended that it should serve, or hinder or deter it in so serving.
- 7. Non-Indians owned a fractional interest and part of the 1/2 royalty interest. The production accruing to those interests and the relationship that those interests bore to-

ward the appellee had no possible connection with any theory of federal instrumentality or federal agency.

Joe M. Whitaker, R. F. Barry, Attorneys for Appel-

lants:

[fol. 128] ACKNOWLEDGMENT OF SERVICE

Personal service of a true and correct copy of the foregoing motion, entitled "Statement of Points to be Relied On," is acknowledged to have been made on me this 7th day of April, 1948.

B. A. Ames, Y. A. Land, B. W. Griffith, Attorneys for

Appellee.

1.

[fol. 129] IN THE SUPREME COURT OF THE UNITED STATES

. [Title omitted]

Designation of the Parts of the Record to Be Printed-Filed April 10, 1948

The Oklahoma Tax Commission, appellant in the above styled and numbered cause, respectfully requests that all portions of the record heretofore filed herein be printed, omitting only those portions thereof that it is provided in sub-section 9 of Rule No. 13 of the above named court, may be omitted.

Joe M. Whitaker, R. F. Barry, Attorneys for Oklahoma Tax Commission.

[fol. 130] ACKNOWLEDGMENT OF SERVICE

Personal service of a true and correct copy of the foregoing motion, entitled "Designation of the Parts of the Record to be Printed", is acknowledged to have been made on me this 7th day of April, 1948.

B. A. Ames, Y. A. Land, B. W. Griffith, Attorneys for

Appelleé.

[fol. 130a] [File endorsement omitted.]

[fol. 131] SUPREME COURT OF THE UNITED STATES

[Title omitted]

Appeal from the Supreme Court of the State of Oklahoma

ORDER DISCUSSING APPEAL AND GRANTING APPLICATION FOR

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Oklahoma, and was duly submitted.

On consideration whereof, It is now here ordered by this Court that the appeal herein be, and the same is hereby, dismissed for the want of jurisdiction.

Treating the appeal papers herein from the Supreme Court of the State of Oklahoma as an application for a writ of certiorari;

On Consideration Whereof, it is ordered by this Court that the said application for writ of certiorari be, and it is hereby, granted. The case is consolidated with No. 704 for argument. The Solicitor General is requested to file a brief as amicus curiae.

Endorsed on Cover: File No. 52,933, Oklahoma, Supreme Court. Term No. 703. Oklahoma Tax Commission, Petitioner, vs. The Texas Company. Filed March 30, 1948. Term No. 703 O. T. 1947.



TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 41/

OKLAHOMA TAX COMMISSION, PETITIONER,

US.

MAGNOLIA PETROLEUM COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF OKLAHOMA

PETITION FOR CERTIORARI FILED MARCH 30, 1948.

CERTIORARI GRANTED APRIL 19, 1948.



JPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 41

OKLAHOMA TAX COMMISSION, PETITIONER,

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MAGNOLIA PETROLEUM COMPANY

OF OKLAHOMA

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IN THE SUPREME COURT OF OKLAHOMA

No. 32678

MAGNOLIA, PETROLEUM COMPANY, a Corporation, Plaintiff in Error,

1.5

THE OKLAHOMA TAX COMMISSION, Defendant in Error

PETITION IN ERROR—Filed June 26, 1946

Comes now Magnolia Petroleum Company, a corporation, plaintiff in error herein, and shows to this Honorable Court that on May 28, 1946, in a proceeding pending before the Oklahóma Tax Commission, being Cases No. 1748, No. 1749, No. 1750 and No. 1751 on the docket of said Tax Commission (said cases having been consolidated for the purpose of the hearing), in which the said Tax Commission proposed to levy gross production and proration taxes against the interests of the Magnolia Petroleum Company in the oil and gas leases involved in said cases, an order and judgment was made and entered with respect to said consolidated cases, finding and ordering that Magnolia Petroleum Com-[fol. 2] pany owed and should pay gross production and proration taxes, with interest and penalty thereon, in the total sum of \$51,266.94 in said cases. That, pursuant to the laws of the State of Oklahoma, your Petitioner herein, the protestant before said Tax Commission, paid under protest the amount found to be due, and duly served notice of appeal upon the said Tax Commission; that there is attached hereto and filed herewith a true and correct transcript of the proceedings had before the Oklahoma Tak Commission, including all pleadings and instruments filed therein, testimony, exhibits and stipulations.

That said transcript of the proceedings shows that the following errors were committed by the Tax Commission, and the same are assigned as errors on this appeal, to-wit:

1

That the oil and gas leases involved in Case No. 1748 are so-called Departmental leases, covering restricted In-

dian lands, and the plaintiff in error, as lessee and operator of said leases, and the leases themselves are Federal instrumentalities, and the Oklahoma Gross Production Tax Law, as applied by said Tax Commission in its order appealed from herein, contravenes the Constitution of the United States and is, therefore, invalid.

[fol. 3]. 2

That the oil and gas lease involved in Case No. 1749 is a so-called Departmental lease, covering restricted Indian lands, and the plaintiff in error, as lessée and operator of said lease, and the lease itself are Federal instrumentalities, and the Oklahoma Gross Production Tax Law, as applied by said Tax Commission in its order appealed from herein, contravenes the Constitution of the United States and is, therefore, invalid.

3

That the oil and gas lease involved in Case No. 1750 is a so-called Departmental lease, covering restricted Indian lands, and the plaintiff in error, as lessee and operator of said lease, and the lease itself are Federal instrumentalities, and the Oklahoma Gross Production Tax Law, as applied by said Tax Commission in its order appealed from herein, contravenes the Constitution of the United States and is, therefore, invalid.

4

That the oil and gas lease involved in Case No. 1751 is a so-called Departmental lease, covering restricted Indian lands, and the plaintiff in error, as lessee and operator of said lease, and the lease itself are Federal instrumentalities, and the Oklahoma Gross Production Tax Law, as applied by said Tax Commission in its order appealed from herein, contravenes the Constitution of the United States and is, therefore, invalid.

[fol. 4]

That the oil and gas leases involved in Case No. 1748 are so-called Departmental leases covering restricted Indian lands, and the plaintiff in error, as lessee and operator of said leases, and the leases themselves are Federal in-

strumentalities, and the Oklahoma Proration Tax Law, as applied by the said Tax Commission in its order appealed from herein, contravenes the Constitution of the United States and is, therefore, invalid.

6

That the oil and gas lease involved in Case No. 1749 is a so-called Departmental lease covering restricted Indian lands, and the plaintiff in error, as lessee and operator of said lease, and the lease itself are Federal instrumentalities, and the Oklahoma Proration Tax Law, as applied by the said Tax Commission in its order appealed from herein, contravenes the Constitution of the United States, and is, therefore, invalid.

7

That the oil and gas lease involved in Case No. 1750 is a so-called Departmental lease covering restricted Indian lands, and the plaintiff in error, as lessee and operator of said lease, and the lease itself are Federal instrumentalities, and the Oklahoma Proration Tax Law, as applied by said Tax Commission in its order appealed from herein, contravenes the Constitution of the United States and is. therefore, invalid.

[fol. 5]

That the oil and gas lease involved in Case No. 1751 is a so-called Departmental lease covering restricted Indian lands, and the plaintiff in error, as lessee and operator of said lease, and the lease itself are Federal instrumentalities, and the Oklahoma Proration Tax Law, as applied by the said Tax Commission in its order appealed from herein, contravenes the Constitution of the United States and is, therefore, invalid.

.9

That the Tax Commission erred in holding the plaintiff in error and its interests in the Departmental oil and gas leases, and the oil and gas produced therefrom, involved in Cases No. 1748, No. 1749, No. 1750 and No. 1751, were subject to the Oklahoma gross production tax. It is the intention of the plaintiff in error in this assignment to charge the above error on the part of the said Tax Com-

mission separately and severally in each of the abovenumbered cases, the same as if a separately stated and numbered assignment of such error were made herein as to each of said cases.

10

That the Tax Commission erred in holding the plaintiff in error and its interests in the Departmental oil and gas leases, and the oil and gas produced therefrom, involved [fol. 6] in Cases No. 1748, No. 1749, No. 1750 and No. 1751, were subject to the Oklahoma proration tax. It is the intention of the plaintiff in error in this assignment to charge the above error on the part of the said Tax Commission separately and severally in each of the above-numbered cases, the same as if a separately stated and numbered assignment of such error were made herein as to each of said cases.

11:

That the order of the Tax Commission herein, levying and assessing gross production taxes against the plaintiff in error and upon its interests in the various Departmental oil and gas leases involved in Cases No. 1748, No. 1749, No. 1750 and No. 1751, is contrary to law. It is the intention of the plaintiff in error in this assignment to charge the above error on the part of the said Tax Commission separately and severally in each of the above numbered cases, the same as if a separately stated and numbered assignment of such error were made herein as to each of said cases.

12

That the order of the Tax Commission herein, levying and assessing proration taxes, against the plaintiff in error and upon its interests in the various Departmental oil and gas leases involved in Cases No. 1748, No. 1749, No. 1750 and No. 1751, is contrary to law. It is the intention [fol. 7] of the plaintiff in error in this assignment to charge the above error on the part of the said Tax Commission separately and severally in each of the above-numbered cases, the same as if a separately stated and numbered assignment of such error were made herein as to each of said cases.

That the order of the Tax Commission levying and assessing gross production taxes against the plaintiff in error and upon its interests in the Departmental leases involved in cases No. 1748, No. 4749, No. 1750 and No. 1751, is contrary to the existing decisions of this Court and of the Supreme Court of the United States. It is the intention of the plaintiff in error in this assignment to charge the above error on the part of the said Tax Commission separately and severally in each of the above-numbered cases, the same as if a separately stated and numbered assignment of such error were made herein as to each of said cases.

1.4

That the order of the Tax Commission levying and assessing proration taxes against the plaintiff in error and upon its interests in the Departmental leases involved in cases No. 1748, No. 1749, No. 1750 and No. 1751, is contrary to the existing decisions of this Court and of the Supreme Court of the United States. It is the intention of the plaintiff in error in this assignment to charge the above error on the part of the said Tax Commission separately [fol. 8] and severally in each of the above-numbered cases, the same as if a separately stated and numbered assignment of such error were made herein as to each of said cases.

15

That the Tax Commission exced in refusing and ruling out competent and legal evidence on the part of the plaintiff in error in Cases No. 1748, No. 1749, No. 1750 and No. 1751. It is the intention of the plaintiff in error in this assignment to charge the above error on the part of the said Tax Commission separately and severally in each of the above-numbered cases, the same as if a separately stated and numbered assignment of such error were made herein as to each of said cases.

Wherefore, Plaintiff in error prays that the Order of the Oklahoma Tax Commission herein, being Order No. 19,686, be reversed, set aside and held for naught, and that this Court render judgment herein in favor of the plaintiff in error and against the said Tax Commission, and for such other relief as may seen just.

Robert W. Richards, Box 1828, Oklahoma City 1, Oklahoma, Attorney for Plaintiff in Error. [fol. 9] [File endorsement omitted]

Case Nos. 1748, 1749, 1750 and 1751

In the Matter of the Protests of Magnolia Petroleum Company against the Assessment of Gross Production and Proration Taxes on Production

Transcript of Tax Proceedings Case Nos. 1748, 1749, 1750 and 1751

Filed in Supreme Court of Oklahoma June 26, 1946

Appeal from Order of Oklahoma Tax Commission Issued May 28, 1946

[fols. 10-12] [Caption omitted]

[fol. 13] Before the Oklahoma Tax Commission

Case No. 1748

In the Matter of the Protests of Magnolia Petroleum Company against the Assessment of Gross Production and Proration Taxes for the Period, from June 1, 1942, to March 31, 1944

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the Magnolia Petroleum Company and the Oklahoma Tax Commission as follows, except that each party reserves the right to introduce any additional testimony or evidence at the hearing upon this matter before the said Tax Commission.

1

That attached hereto as "Exhibit-A" is a photostatic copy of the assessment notice issued by the Tax Commission and served upon the Protestant in the proceedings herein; and that attached hereto as "Exhibit-B" is a true and correct copy of the protest duly filed by said Protestant herein.

Described in Notice of Assessment as the Frank Davis Lease, covering the N/2 NE/4 Sec. 15-7-4, Pottawatomie County, Oklahoma.

[fol. 14] That Frank Davis or Muc-puc, was the owner of the above-described land during the period of time involved herein and prior thereto, by virtue of the same having been allotted to him as a member of the Citizen Pottawatomie Tribe of Indians, Allottee No. 809; that attached hereto as "Exhibit C-1" is a photostatic copy of the trust deed which was issued by the United States of America, pursuant to the laws of the United States; that attached hereto as "Exhibit C-2" is a copy of the Departmental oil and gas lease executed by the said Frank Davis.

3

Described in Notice of Assessment as 3/4 Interest in the Kla-da-ing Lease, covering the N/2 NW/4 SW/4 Sec. 3-5-9, Caddo County, Oklahoma.

That an undivided three-fourths interest in the above described land; during the period of time involved herein and for a number of years prior thereto, was owned by the full-blood Apache Indian heirs of the allottee, Kla-da-ing, Allottee No. 942, of the Apache Tribe of Indians; that attached hereto as "Exhibit D-1" is a photostatic copy of trust deed being the present muniment of title issued by the United States of America to the said Kla-da-ing; that attached hereto as "Exhibit D-2" is a photostatic copy of the Departmental oil and gas lease which was executed by the heirs of Kla-da-ing.

4

Described in Notice of Assessment as the Joseph Nona [fol. 15] Lease, covering the NW/4 Sec. 11-7-4, Pottawatomic County, Oklahoma.

That the above described land was owned during the period of time involved herein, and for a number of years prior thereto, by Joseph Nona, son and sole heir of Angeline Nona, Allottee No. 120, of the Citizen Pottawatomie Tribe of Indians; that the said Joseph Nona is also a member of the Citizen Pottawatomie Tribe of Indians;

.

that attached hereto as "Exhibit E-1" is the stub of Pettawatomie Land Certificate No. 120, issued to Angeline Nona covering the above-described land, issued pursuant to the Act of May 23, 1872; that attached hereto as "Exhibit E-2" is a copy of the form of land certificate which was issued to the said Angeline Nona; and that attached hereto as "Exhibit E-3" is a photostatic copy of the Departmental oil and gas lease executed by Joseph Nona.

5

Described in Notice of Assessment as $\frac{2}{3}$ Interest in the Pau-Kune Lease, covering the N/2 NE/4 Sec. 10-5-9, Caddo County, Oklahoma.

That an undivided two-thirds interest in the above described land, during the period of time involved herein and for a number of years prior thereto, was owned by certain full-blood Apache Indians who were heirs at law, and, also, devisees of the allottee, Pau-Kune, Allottee No. 951, of the Apache Tribe of Indians; that attached hereto as "Exhibit F-1" is a photostatic copy of the trust deed which was issued to Pau-Kune, covering the above-described land, as well as other lands; that attached hereto as "Exhibit [fol. 16] F-2" is a photostatic copy of the Departmental oil and gas lease executed by Pau-Kune.

Described in Notice of Assessment as the Harry Saunders Lease, covering the N/2 SW/4 Sec. 4-22-3, Pawnee County, Oklahoma.

That the above-described land, during the period of time involved herein and prior thereto, was owned by Harry Saunders, Allottee No. 42, of the Otoe & Missouria Tribe of Indrans; that attached hereto as "Exhibit G-12" is a photostatic copy of the trust patent issued by the United States of America to the said Harry Saunders; that the stamped notation, "fee patent issued", appearing on the face of this instrument, does not refer to the N/2 SW/4 but to the S/2 SW/4 of said section; and that attached hereto as "Exhibit G-2" is a photostatic copy of the Departmental oil and gas lease executed by Harry Saunders.

Described in Notice of Assessment as the Tissovo Lease, covering the SE/4 Sec. 22-1S-9W, Stephens County, Oklahoma.

That Tissoyo, Allottee No. 366, of the Comanche Tribe of Indians, was the owner of the above-described land during the time involved herein and prior thereto; that attached hereto as "Exhibit H-1" is a photostatic copy of the trust deed issued to said allottee by the United States of America; that attached hereto as "Exhibit H-2" is a photostatic copy of the Departmental oil and gas lease executed by Tissoyo.

·[fol. 17]

8

Described in Notice of Assessment, as the Nicholas Vieux Lwase, covering the W3/4-W/2-W/2-SE/4 Sec. 13-74, Pottawatomie County, Oklahoma.

That Nicholas Vieux, a member of the Citizen Pottawatomie Tribe of Indians, was the owner of the abovedescribed land during the period of time involved herein, and for a number of years prior thereto; that he inherited said land as an heir of the allottee, Madeline Bourbonnais, a member of the Citizen Pottawatomie Tribe of Indians; that after the death of the allottee, her allotment was partitioned among her heirs by the United States Department of Interior, and after it was partitioned, the United States of America issued a trust deed covering the above-described land, as well as other land, to Nicholas Vieux, the present owner: that attached hereto as "Exhibit J-1" is a photostatic copy of said trust deed; that also attached, as "Exhibit J-2", is a photostatic copy of the Departmental oil and gas lease executed by Nicholas Vieux and the other heirs of Madeline Bourbonnais.

9

That during the period of time involved herein and prior thereto, the lands described in the preceding paragraphs of this stipulation were held in trust by the United States of America for the use and benefit of the respective owners; and that the United States of America had issued trust deeds to all of said lands, pursuant to the provisions of the General Allotment Act of 1887, as amended, except with

respect to the lands of Joseph Nona, referred to in paragraph 4 above.

[fol. 18]

10

That pursuant to the provisions of the General Allownent of Act of 1887, as amended, the President of the United States of America has, from time to time, extended the trust periods named in the respective trust deeds, and the period of time involved herein was within these extended trust periods.

11

That the owners of the lands described in the preceding paragraphs of this stipulation are members of the Indian, tribe indicated in the paragraph relating to each separately described tract of land and the oil and gas lease thereon; that such lands are restricted from alienation, except with the approval of the Secretary of the Interior.

12

That the oil and gas leases referred to in the preceding paragraphs of this stipulation, photostatic copies of which are attached "Exhibits C-2, D-2, E-2, F-2, G-2, H-2 and J-2", were approved by the Secretary of the Interior; that attached hereto as "Exhibit K" is a true and correct copy. of the Regulations of the United States Department of the Interior in force for the period as shown; that said leases which were not executed in favor of Magnolia Petroleum Company were assigned to it, and during the period of time involved herein, and for a number of years prior thereto, said Magnolia Petroleum Company was the owner of said oil and gas leases insofar as they covered the tands de-[fol. 19] scribed in the preceding paragraphs of this stipulation; that the assignments of these oil and gas leases to Magnolia Petroleum Company were made with the consent of and approved by the Secretary of the Interior Department of the United States.

13

That Magnolia Petroleum Company has developed said lands involved herein for oil and gas purposes, and produced oil and gas therefrom pursuant to the terms of its leases thereon; that attached hereto as Exhibits "L" and "M" are true and correct copies of the Regulations of the United States Department of Interior pertaining to oil and gas operations upon such lands, that pursuant to said Regulations Magnolia Petroleum Company made the reports and obtained the approvals and authorizations attached hereto as Exhibits "O" through "V", and the same are typical reports made and approvals and authorizations obtained with respect to oil and gas operations conducted upon the lands described above.

14

That the Gross Production and Proration Taxes which the Oklahoma Tax Commission seeks to collect from Magnolia Petroleum Company in this proceeding are levied upon the interests of the Magnolia Petroleum Company in the said oil and gas leases covering the lands described in the preceding paragraphs of this stipulation.

Magnolia Petroleum Company, by Robert W. Richards, Its Attorney.

[fol. 20] Oklahoma Tax Commission, by E. L. Mitchell and C. W. King, Attys. of Record.

[fol. 21] Before the Oklahoma Tax Commission.

Case No. 1749

In the Matter of the Protests of Magnolia Petroleum Company against the Assessment of Gross Production and Proration Taxes on the R. H. Robedeaux Lease, covering the SE/4 Ses. 32-23-3, Pawnee County, Oklahoma

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the Magnolia Petroleum Company and the Oklahoma Tax Commission as follows, except that each party reserves the right to introduce any additional testimony or evidence at the hearing upon this matter before the said Tax Commission.

1

That attached hereto as "Exhibit-A" is a photostatic copy of the assessment notice issued by the Tax Commis-

sion and served upon the Protestant in the proceedings herein; and that attached hereto as "Exhibit-B" is a true and correct copy of the protest duly filed by said Protestant herein.

2

Described in Notice of Assessment as the R. H. Robedeaux [fol. 22] Lease, covering the SE/4 Sec. 32-23-3, Pawnee County, Oklahoma.

That during the period of time involved hereing and for a number of years prior thereto, the above described land was owned by Horton Homoratha, son of the allottee, Rachael H. Robedeaux, and a full-blood Indian of the Otoe & Missouria Tribe; that said land was allotted to Rachael H. Robedeaux, Allottee No. 186-A, a member of the Otoe & Missouria Tribe of Indians; that attached hereto as "Exhibit C-1" is a true and correct copy of the trust deed issued to said allottee; that attached hereto as "Exhibit C-2" is a true and correct copy of the "Approval of Heirship of the Department of the Interior, Office of Indian Affairs," dated December 8, 1924; that attached hereto as "Exhibit C-3" is a true and correct copy of a "Deed, Non-.. competent Indian Lands" executed by Rachael H. Robedeaux on January 31, 1924, in favor of Horton Homoratha, conveying unto the latter the E/2 SE/4 of Sec. 32; that attached hereto as "Exhibit C-4" is a true and correct copy of a similar deed executed by Rachael H. Robedeaux on October 4, 1921, in favor of Horton Homoratha, conveying the W/2 SE/4 of Sec. 32; that the foregoing instruments are the present muniments of title; that attached hereto as "Exhibit C-5" is a photostatic copy of the oil and gas lease executêd by Rachael H. Robedeaux.

3

That the oil and gas lease referred to above was approved by the Secretary of the Interior; that attached to the stipulation in Case No. 1748, as "Exh bit K" is a true and correct [fol. 23] copy of the Regulations of the United States Department of Interior in force for the period as shown, which is incorporated herein as "Exhibit D", by reference thereto; that by virtue of various assignments, Magnolia Petroleum Company became the owner of, and during the period of time involved herein and for a number of years prior

thereto was the owner of, said oil and gas lease; that the assignments of said oil and gas lease were made with the consent and approval of the Secretary of the Interior of the United States.

4

That the Gross' Production and Proration Taxes which the Oklahoma Tax Commission seeks to collect from Magnolia Petroleum Company in this proceeding are levied upon the interest of the Magnolia Petroleum Company in the said oil and gas lease covering the land first above described.

5

That Magnolia Petroleum Company has developed said land involved herein for oil and gas purposes and produced oil and gas therefrom, pursuant to the terms of its lease thereon; that attached to the stipulation in Case No. 1748; as Exhibits "L" and "M", are true and correct copies of the regulations of the United States Department of the Interior pertaining to oil and gas operations upon such lands, and the same are incorporated herein as Exhibits "E" and "F" by reference thereto; that pursuant to said Regulations, Magnolia Petroleum Company made the reports and obtained the approvals and authorizations attached to the stipulation in Case No. 1748 as Exhibits "O" through "V", which are typical reports made and approvals and [fol. 24] authorizations obtained with respect to oil and gas. operations conducted upon the land described above, and that the same are incorporated herein as Exhibits through "L" by reference thereto.

Magnolia Petroleum Company, by Robert W. Richards, Its Attorney; Oklahoma Tax Commission, by E. L. Mitchell and C. W. King, Attys. of Record.

[fol. 25] BEFORE THE OKLAHOMA TAX COMMISSION

Case No. 1750

In the Matter of the Protest of Magnolia, Petroleum Company against Assessment of Gross Production and Proration Taxes on the ¼ interest in the Kla-da-ing Lease, the N/2 NW/4 SW/4 of Sec. 3-5-9, in Caddo County, Oklahoma

STIPULATION OF FACTS.

It is hereby stipulated and agreed by and between the Magnolia Petroleum Company and the Oklahoma Tax Commission as follows, except that each party reserves the right to introduce any additional testimony or evidence at the hearing upon this matter before the said Tax Commission.

1

That attached hereto as "Exhibit-A" is a photostatic copy of the assessment notice issued by the Tax Commission and served upon the Protestant, in the proceedings herein; and that attached hereto as "Exhibit-B" is a true and correct copy of the protest duly filed by said Protestant herein.

2

Described in Notice of Assessment as the 1/4 Interest [fol. 26] in the Kla-da-ing Lease, covering the N/2 NW/4 SW/4 of Sec. 3-5-9, Caddo County, Oklahoma.

That during the period of time involved herein an undivided ¼ interest in the above-described land, including a similar interest in the oil and gas thereunder, was owned either by certain non-Indian grantees of the heirs of Mary Moleno or by the non-Indian heirs of Mary Moleno; that attached hereto as "Exhibit-C" is a true and correct copy of the fee patent issued by the United States of America to The Heirs of Mary Moleno, Devisee of Moleno, Heir of Wau-co-chah and Kla-da-ing (Black Apache), Apache Indians; that this undivided interest is in land which was allotted to Kla-da-ing, a full-blood Apache Indian, and Allottee No. 942 of said Tribe; that "Exhibit D-1" attached to the stipulation in Case No. 1748 is a photostatic copy of the trust deed issued by the United

States of America to the said Kla-da-ing, and said deed is incorporated herein as "Exhibit-D" by reference thereto; that "Exhibit D-2" attached to the stipulation in said Case No. 1748 is a photostatic copy of the Departmental oil and gas lease executed by the heirs of Kla-da-ing, named therein, and said lease is incorporated herein as "Exhibit-E" by reference thereto.

3

That the above oil and gas lease was approved by the Secretary of the Interior; that "Exhibit-K" attached to the stipulation in Case No. 1748 is a true and correct copy of the Regulations of the United States Department of the Interior for the period as shown, and said copy of the [fol. 27] Regulations is incorporated herein as "Exhibit-F" by reference thereto; that by virtue of various assignments, Magnolia Petroleum Company became the owner, and during the period of time involved herein and for a number of years prior thereto was the owner, of said oil and gas lease insofar as it covered the land described above; that the assignment of this oil and gas lease to Magnolia Petroleum Company was made with the consent of and approved by the Secretary of the Interior Department of the United States.

4

That the Gross Production and Proration Taxes which the Oklahoma Tax Commission seeks to collect from Magnolia Petroleum Company in this proceeding are levied upon the interest of the Magnolia Petroleum Company in the said oil and gas lease covering the land first described above.

5

That Magnolia Petroleum Company has developed said land involved herein for oil and gas purposes and produced oil and gas therefrom pursuant to the terms of its lease thereon; that attached to the stipulation in Case, No. 1748, as Exhibits "L" and "M", are true and correct copies of the Regulations of the United States Department of the Interior pertaining to oil and gas operations upon such lands, and the same are incorporated herein as Exhibits "G" and "H" by reference thereto; that pursuant to said Regula-[fols. 28-29] tions, Magnolia Petroleum Company made the reports and obtained the authorizations and approvals at-

tached to the stipulation in Case No. 1748 as Exhibits "O"; through "V", which are typical reports made, and approvals and authorizations obtained with respect to oil and gas operations conducted upon the land described above, and that the same are incorporated herein as Exhibits "J" through "O", by reference thereto.

6

That during the time involved herein and prior thereto the remaining undivided three-fourths interest in this land was owned by full-blood Indian heirs of Kla-da-ing, the allottee, subject to the said oil and gas lease of Magnelia Petroleum Company; and that the United States of America has not issued a fee patent to these full-blood owners.

Magnolia Petroleum Company, by Robert W. Richards, Its Attorney; Oklahoma Tax Commission, by E. L. Mitchell and C. W. King, Attys. of Record.

[fol. 30] Before THE OKLAHOMA TAX COMMISSION

Case No. 1751

In the Matter of the Protest of Magnolia Petroleum Company against Assessment of Gross Production and Proration Taxes on the 1/3 interest in the Pau-Kune Lease, the N/2 NE/4 Sec. 10-5-9 Caddo County, Oklahoma

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the Magnolia Petroleum Company and the Oklahoma Tax Commission as follows, except that each party reserves the right to introduce any additional testimony or evidence at the hearing upon this matter before the said Tax Commission.

1

That attached hereto as "Exhibit-A" is a photostatic copy of the assessment notice issued by the Tax Commission and served upon the Protestant, in the proceedings herein; and that attached hereto as "Exhibit-B" is a true and correct copy of the protest duly filed by said Protestant herein.

Described in Notice of Assessment as the ½ Interest [fol. 31] in the Pau-Kune Lease, covering the N/2 NE/4 of Sec. 10-5-9, Caddo County, Oklahoma.

That during the time involved herein the above-described 1/3 interest was owned either by the non-Indian widow of the allottee, Pau-Kune, an Apache Indian who died April 4, 1919, or the grantees of said widow; that the said Pau-Kune devised, by duly approved will, this interest to his non-Indian wife; that "Exhibit F-1" attached to the stipulation in Case No. 1748 is a photostatic copy of the trust deed which was issued to Pau-Kune covering his allotment, which included this as well as other land, and said deed is incorporated herein as "Exhibit-C"; that "Exhibit F-2" attached to the stipulation in said Case No. 1748 is a photostatic copy of the Departmental oil and gas lease executed by Pau-Kune covering the N/2 NE/4 of Section 10, as well as other land, and said lease is incorporated herein as "Exhibit-D" by reference thereto.

3

That the above oil and gas lease was approved by the Secretary of the Interior; that "Exhibit-K" attached to the stipulation in Case No. 1748 is a true and correct copy of the Regulations of the United States Department of Interior for the period as shown, and said copy of the Regulations is incorporated herein as "Exhibit E" by reference thereto; that by virtue of various assignments, Magnolia Petroleum Company became the owner, and during the period of time involved herein and for a number of years prior thereto was the owner, of said oil and gas lease insofar as it covered the land described above; that the assignment of this oil and gas lease to Magnolia Pe-[fol. 32] troleum Company was made with the consent of and approved by the Secretary of the Department of Interior of the United States.

4

That the Gross Production and Proration Taxes which the Oklahoma Tax Commission seeks to collect from Magnolia Petroleum Company in this proceeding are levied upon the interest of the Magnolia Petroleum Company in the said oil and gas lease covering the land first described above.

That Magnolia Petroleum Company has developed said land involved herein for oil and gas purposes and produced oil and gas therefrom pursuant to the terms of its lease thereon; that attached to the stipulation in Case No. 1748, as Exhibits "L" and "M", are true and correct copies of the Regulations of the United States Department of the Interior pertaining to oil and gas operations upon such lands, and the same are incorporated herein as Exhibits "F" and "G" by reference thereto; that pursuant to said Regulations, Magnolia Petroleum Company made the reports and obtained the authorizations and approvals attached to the stipulation in Case No. 1748 as Exhibits "O" through "V", which are typical reports made, and approvals and authorizations obtained with respect to oil and gas operations conducted upon the land described above. and that the same are incorporated herein as Exhibits "H" through "M" by reference thereto.

6

That during the time involved herein and prior thereto [fol. 33] the remaining undivided two-thirds interest in this land was owned by full-blood Indian heirs of Pau-Kune, the allottee, subject to the said oil and gas lease of Magnolia Petroleum Company; and that the United States of America has not issued a fee patent to these full-blood owners.

Magnolia Petroleum Company, by Robert W. Richards, Its Attorney; Oklahoma Tax Commission, by E. L. Mitchell, C. W. King. Attys. of Record.

[fol. 34] Before Oklahoma Tax Commission

Transcript of Hearing

Thereafter, on May 13, 1946, said matters came on for hearing before the Oklahoma Tax Commission, pursuant to notice duly given to all parties interested in each of said styled and numbered causes.

APPEARANCES:

C. W. King, Attorney, for the Oklahoma Tax Commission. Robert W. Richards, Attorney, for the Protestant.

The Oklahoma Tax Commission being in session and said causes being called for hearing, the following proceedings were had:

STATEMENT FOR COMMISSION

Mr. King: If it please the Commission, we have here four cases, entitled In the Matter of the Protest of Magnolia Petroleum Company against the Assessment of Gross Production and Proration Taxes on Production of Oil and Gas from Wild Tribes Indian Leases, for the periods beginning June 1, 1942 and to March 31, 1944. The cases are numbered 1748, 1749, 1750 and 1751 and all cover the same

period.

Now, these cases we want to consolidate for the purpose of this hearing. There are some different questions that will arise, due to the degree of Indian blood or Non-Indian blood [fol. 35] of the owners of the mineral rights and certain The cases involve the same thing in the way of legal questions that are now under consideration by the Supreme Court in the case of The Texas Company vs. the Oklahoma Tax Commission,—that is, whether or not the Oklahoma Gross Production Tax on oil and gas and other minerals may be lawfully assessed and collected against the lessees' interests in such production derived from restricted Indian lands. The royalty interest as to the restricted Indians, lessors, or holders of the mineral rights, are not involved. One case involves the question of whether or not the owner of the mineral rights or lessor's fractional interest having vested in a non-Indian may operate to make the entire production on that legal sub-division or survey of the lease free from gross production tax. The theory of that will be presented by opposing counsel.

We have executed stipulations in the cases, which we ask to be considered a part of the record, properly identified and filed. We also wish to introduce a complete computation of the taxes, as made by the Gross Production Tax Division of the Oklahoma Tax Commission, and to that offer I believe

there will be no objection.

Counsel for Protestant: That's right.

Reporter's Note: This exhibit, as all other exhibits, will be attached to the record immediately following the oral testimony and proceedings had at this hearing.

[fol. 36] Mr. King: It is also agreed that such compilation, on the same basis as presented, may be brought down

to date.

Now, for the benefit of the Commission, since you are going to have to rule on this case, I will read the stipulation in one case, if you wish, and it will be typical of all the cases except as to the one circumstance I mentioned, about the non-Indian. Is that satisfactory?

· Chairman Martin: Yes.

Mr. King, Counsel for Tax Commission: I will read the Protest in Number 1748. The protest in that case, eliminating the formal parts, is as follows:

Reporter's Note: Counsel for the Tax Commission read

the Protest in case No. 1748.

Counsel for the Tax Commission then read the Stipulation in said case.

Mr. King: I wish to offer in evidence the stipulation in each of the cases above styled and numbered, and all of the exhibits named in each stipulation.

Above exhibits are made a part of the record and are attached immediately following record of oral testimony

and proceedings had at hearing.

Chairman Martin: How do you men propose to handle this in the event of an appeal,—are you going to take one case to the Supreme Court or—

Counsel for Protestant: If the court please, it was our [fol. 37] thought that since Mr. King asked that the four

cases be consolidated we may take them up together.

Mr. King: When I said that I meant for the purpose of this hearing, only. I didn't comtemplate stipulating as to what we are going to do after the cases are decided,—that would be pre-supposing,—the consolidation is only for the purpose of this hearing.

Mr. King: It is stipulated, of course, that the proration tax and the gross production tax are involved, in the same respects and the same contention applies to one as to the other.

Mr. King: We also wish to offer in evidence the compilation referred to in the opening statement, of the taxes, and if not brought down to date at the time the case is finally decided, it is stipulated that the calculations and computations of the amount of taxes due, in each case, may be brought down to the time of final adjudication.

Reporter's Note: This exhibit, with all others, will be made a part of the record and attached following this transcript.

Mr. King: It is agreed that all of the assessment letters and the computation attached to each are contained in the stipulation and are, therefore, for the purpose of preventing duplication, not separately introduced.

Mr. King: The question before the Commission, ultimately to be decided here, as stated in the agreed statement [fol. 38] of facts, being paragraph two, of case 1748,—the contention of the taxpayer is that during the period of time involved herein the taxpayer has consistently claimed and maintained that the gross production involved in these cases is exempt and free from gross production and proration taxes. That during all of said time and prior thereto it has been likewise the contention of the Oblahoma Tax Commission, present and preceding ones, that such production has at all times been subject to gross production and proration taxes under the laws of the State of Oklahoma.

Reporter's Note: The exhibits above mentioned are attached following this transcript and are made a part of this record.

Counsel for Tax Commission: We rest.

[fol. 39] R. E. Chandler, called as a witness for protestant, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, in answer to interrogatories propounded to him, testified as follows:

Direct examination.

By Mr. Richards:

- Q. State your name.
- A. R. E. Chandler.
- Q. You are an employee of the Magnolia Petroleum Company?
 - A. Yes, sir.
- Q. Were you formerly Assistant Production Superintendent for the State of Oklahoma?
 - A. Yes sir.
 - Q. How long have you served in that capacity?
 - A. From 1926 to May, 1944.
- Q. Mr. Chandler, are you familiar with the Indian leases involved in this hearing,—you have examined the exhibits here and are familiar with the several leases involved?
 - A. Yes, I am familiar with them.
- Q. In your capacity as Production Superintendent, or Assistant Production Superintendent, did you have occasion to supervise the operations on these leases?
 - A. Yes, I did.
- Q. In your capacity was it the customary practice of the Magnolia Petroleum Company to comply, in all of its pro[fol. 40] duction operations, with the rules and regulations promulgated by the Department of the Interior with respect to such Wild Tribes leases?
 - A. (No Ans-er, because of objection.)

Counsel for Tax Commission: We object to that, for the reason that the witness is incompetent to state the policy of the Magnolia Petroleum Company and if the witness does have knowledge of the policy of the Company in that respect, independently of the actual practice the Company follows, it is not proper for him to state whether the Company's policy to follow the regulations, whether it is the policy of the Company to follow the regulations of the Department of the Interior,—it is wholly immaterial in these cases and has nothing to do with the issues involved here. The issues raised here,—the issue here is whether or

not these properties are exempt under the terms and conditions of the leases and under the provisions of law applicable thereto.

Counsel for Protestants: Let me ask the witness,-

Q. Mr. Chandler, were the Field Superintendents who had charge of these leases herein, instructed, furnished instructions to the effect that when work was to be done in connection with the production operations they should submit the data and information to your office?

A. That's correct, yes, sir.

[fol. 41] Counsel for Tax Commission: We object to that question and ask that the answer be stricken, for the reason that the legal rights of the State and the Company can in no wise be altered by what anybody would do.

Chairman Martin: Sustained.

Counsel for Protestant: Give us an exception. And I want to make an offer of proof.

STATEMENT RE TESTIMONY

Comes now the Magnolia Petroleum Company and tenders the following evidence as the testimony of Mr. R. E. Chandler and Mr. R. Robnett.

Objections to the competency of such testimony having been sustained, the Protestant herein offers the following as being in substance the testimony which would have been given by these witnesses, Mr. R. E. Chandler and Mr. R. Robnett, had they been permitted to so testify:

That the Magnolia Petroleum Company, in its production operations upon the oil and gas leases involved in each of the cases herein, has conducted all operations in accordance with the rules and regulations promulgated by the Department of the Interior of the United States,—that pursuant thereto it was the policy of the Magnolia Petroleum Company to observe and follow each of such regulations and conform with each regulation, as well as the specific authorization given by the Geological Surveys, Office of Defol. 42] partment of the Interior, having to do with the enforcement of such regulations during the period of time herein involved,—that the Field Superintendent of the Magnolia Petroleum Company having such Wild Tribes oil and gas leases within their territory were furnished lists of such leases and were informed and instructed that all operations

upon such leases must be conducted in accordance with the rules and regulations mentioned and that all work upon such leases must be submitted to the Division Superintendent's Office, in order that permission from the Geological Survey could be obtained to do such work. That in respect to the oil and gas leases in question the Magnolia Petroleum Company, in accordance with such rules and regulations, submitted the necessary requests for authorization and approval to perform such work upon such leases,-that when work was to be done upon such leases, such as abandoning, plugging, drilling deeper, or other substantial changes were to be made in the leasehold, proper application was made to the Geological Survey Department of the Department of the Interior and thereafter such Geological Survey issued written letters of approval or authorization, either approving the suggested manner in which the work was to be done or specifying any changes which such Geological Survey thought should be made for or in the specifications submitted for such work. That it was customary for the Geological Survey Representative to be present upon the lease when any well was plugged, or when any well was to be [fol. 43] plugged, even though written permission and authority to perform such work had been previously obtained from such Geological Survey. That on many occasions in respect to these leases the Geological Survey Representatives made suggestions as to changes in the method of operation and in the manner of operations,—the manner in which such operations should be conducted and were to be conducted. That the Geological Survey maintained the same supervisory interest in the Pau-Kune, in the Kla-da-ing and Robedeaux leases as they did in all other Wild Tribes leases as involved herein, that physical inspection of the oil and gas leases and premises were made from time to time, by representatives of the Geological Survey, that suggestions were made therewith that the Geological Survey Representatives were interested in the continuation of production of oil and gas from such leases and it was necessary for Magnelia Petroleum Company to show economic justification before such Geological Survey would authorize the abandonment and plugging of any well upon any of the leases herein involved. That in the event work was commenced upon one of the leases, after approval and authorization for such work had been obtained, if it became apparent

that the approved specifications for such work would not be satisfactory then it was necessary to, and the Magnolia Petroleum Company did, obtain the approval from such Department to such changes in the work. That on several occasions with respect to said leases the Geological Survey Representatives called the attention of the Magnolia Petro-[fol. 44] leum Company to the necessity for offset wells, without waiting for the Magnolia Petroleum Company to submit their requests to drill such offset well on its lease.

That the witness named Mr. Chandler, would further testify from his experience, that it cost additional money for the Magnolia Petroleum Company to operate in accordance with the rules and regulations of the Department of the Interior applicable to these leases than it did to leases wherein the Interior Department had no jurisdiction or interest; that he would further testify that in one instance, after a physical inspection of the Nona lease, the Geological Survey Representative requested that certain surface obstructions be removed from and around an abandoned well.

That the witness, Mr. Robinett, would further testify that during the period from 1944 after Mr. Chandler left the office of Assistant Production Superintendent, he took over the duties relating to these oil and gas leases and that since that time such oil and gas leases have been operated as set forth above.

Counsel for Protestant: Of course, I want the record to show the offer of this testimony, that an objection to its admission has been sustained and that we except to the ruling of the Court.

[fol. 45] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 46] BEFORE THE OKLAHOMS TAX COMMISSION

Case No. 1748

(Consolidated with Cases No. 1749, No. 1750 and No. 1751)

In the Matter of the Protest of the Magnolia Petroleum Company, a Corporation, against the Assessment of Gross Production and Profation Taxes on Production from Wild Tribes Indian Leases.

ORDER No. 19,686

Now on the 13th day of May, 1946, this matter came on to be heard on the protest of the Magnolia Petroleum Company, a corporation, against the assessment of Gross Production and Proration Taxes on production from Wild Tribes Indian Leases for the period of time from June 1, 1942, to March 1, 1946, and by agreement of the parties and upon order of the Oklahoma Tax Commission, Cases numbered 1748, 1749, 1750 and 1751 were consolidated as Case No. 1748 for the purpose of this hearing.

Richards, and the Oklahoma Tax Commission, by its assistant attorney, C. W. King, thereupon the matter was submitted to the Commission upon the evidence and argument of counsel, and after hearing the evidence and argument, the Commission took the matter under advisement.

Thereafter, on the 13th day of May, 1946, the Commission [fol. 47] being fully advised in the premises, finds the issues against the Protestant; and the Commission further finds that the protests of Magnolia Petroleum Company against the assessment of Gross Production and Proration Taxes should be denied, and that Gross Production and Proration Taxes should be assessed against said Protestant in the consolidated cases herein, as follows, to-wit:

- (1) Case No. 1748—Gross Production Tax in the sum of \$26,764.39, for the period from June 1, 1942, to March 1, 1946, with interest and penalty thereon to May 1, 1946, in the sum of \$10,289.32, making a total of \$37,053.71. Proration Tax in the sum of \$479.21, for the same period of time, with interest and penalty thereon to May 1, 1946, in the sum of \$200.63, making a total of \$679.84.
- (2) Case No. 1749—Gross Production Tax in the sum of \$249.67, for the period from June 1, 1942, to March 31, 1944,

with interest and penalty thereon to May 1, 1946, in the sum of \$139.86, making a total of \$389.53. Proration Tax in the amount of \$4.90, for the period from June 1, 1942, to March 31, 1944, with interest and penalty thereon to May 1, 1946, in the sum of \$2.77, making a total of \$7.67.

- (3) Case No. 1750—Gross Production Tax in the sum of \$95.58, for the period from June 1, 1942, to March 1, 1946, with interest and penalty thereon to May 1, 1946, in the sum of \$30.94, making a total of \$126.52. Proration Tax in the amount of \$1.55, for the period from June 1, 1942, to March [fol. 48] 1, 1946, with interest and penalty thereon to May 1, 1946, in the sum of \$0.52, making a total of \$2.07.
- (4) Case No. 1751—Gross Production Tax in the sum of \$9,258.95, for the period from June 1, 1942, to March 1, 1946, with interest and penalty thereon to May 1, 1946, in the sum of \$3,514.76, making a total of \$12,773.71. Proration Tax in the amount of \$164.92, for the period from June 1, 1942, to March 1, 1946, with interest and penalty thereon to May 1, 1946, in the sum of \$68.97, making a total of \$233.89.

It/is, therefore, By the Tax Commission, Considered, Ordered and Adjudged That the protests of Magnolia Petroleum Company against the assessment of Gross Production and Proration Taxes in Cases No. 1748, No. 1749, No. 1750 and No. 1751, consolidated herein as Case No. 1748, be denied in each case, and that there be hereby assessed against said Protestant Gross Production and Proration Taxes in each case, as follows:

- (1) Case No. 1748.—Gross Production Tax in the sum of \$26,764.39, for the period from June 1, 1942, to March 1, 1946, with interest and penalty thereon to May 1, 1946, in the sum of \$10,289.32, or a total of \$37,053.71. Proration Tax in the sum of \$479.21, for the same period of time, with interest and penalty thereon to May 1, 1946, in the sum of \$200.63, or a total of \$679.84, making a total of Gross Production and Proration Taxes, including interest and penalties thereon, in the amount of \$37,733.55.
- [fol. 49] (2) Case No. 1749.—Gross Production Tax in the sum of \$249.67, for the period from June 1, 1942, to March 31, 1944, with interest and penalty thereon to May 1, 1946, in the sum of \$139.86, or a total of \$389.53. Proration Tax in the amount of \$4.90, for the period from June 1, 1942, to

March 31, 1944, with interest and penalty thereon to May 1, 1946, in the sum of \$2.77, or a total of \$7.67, making a total of Gross Production and Proration Taxes, including interest and penalties thereon, in the amount of \$397.20.

- (3) Case No. 1750.—Gross Production Tax in the sum of \$95.58 for the period of time from June 1, 1942, to March 1, 1946, with interest and penalty thereon to May 1, 1946, in the sum of \$30.94, or a total of \$126.52. Proration Tax in the amount of \$1.55, for the same period of time, with interest and penalty thereon to May 1, 1946, in the sum of \$0.52, or a total of \$2.07, making a total of Gross Production and Proration Taxes, including interest and penalties thereon, in the amount of \$128.59.
- (4) Case No. 1751.—Gross Production Tax in the sum of \$9,258.95, for the period from June 1, 1942, to March 1, 1946, with interest and penalty thereon to May 1, 1946, in the sum of \$3,514.76, or a total of \$12,773.71. Proration Tax in the amount of \$164.92, for the same period of time, with interest and penalty thereon to May 1, 1946, in the sum of \$68.97, or a total of \$233.89, making a total of Gross Production and Proration Taxes, including interest and penalties thereon, in the amount of \$13,007.60.

The total Gross Production and Proration Taxes, including interest and penalties as set forth above, hereby assessed

being in the sum of \$51,266.94.

[fol. 50] Oklahoma Tax Commission, By J. Frank Martin, Chairman; Ernest M. Black, Vice-Chairman.

Attest: H. D. Canfield, Secretary. O.K., C. W. King.

[fol. 51] Before the Oklahoma Tax Commission

Case No. 1748

In the Matter of the Protest of the Magnolia Petroleum Company, a Corporation, against the Assessment of Gross Production and Proration Taxes on Production from Wild Tribes Indian Leases for the Period from June 1, 1942, to March 1, 1946.

NOTICE OF INTENTION TO APPEAL

Comes now the Magnolia Petroleum Company, a corporation, taxpayer herein, and, feeling itself aggrieved by the order, ruling and finding of the Oklahoma Tax Commission directly affecting said taxpayer, in assessing against it gross production and proration taxes on production obtained from Wild Tribes Indian Leases for the period from June 1, 1942, to March 1, 1946, inclusive, in the total amount of \$51,822.22, including penalties thereon to June 1, 1946, hereby gives written notice of its intention to appeal from such order and ruling of said Commission to the Supreme Court of the State of Oklahoma, and respectfully requests that the Oklahoma Tax Commission furnish said taxpayer with the original and one copy of a transcript of the proceedings had before said Tax Commission in connection with the matter above complained of.

A copy of the Tax Commission's Order No. 19,686, from which Magnolia Petroleum Company gives notice of appeal to the Supreme Court of Oklahoma, is hereto attached, [fol. 52] marked "Exhibit-A" and made a part hereof; said total amount of gross production and proration taxes being paid herewith under protest as by law required.

Dated this 6th day of June, 1946.

Magnolia Petroleum Company, By Robert W. Richards; W. R. Wallace, Its Attorneys.

Service of the above Notice of Appeal to the Supreme Court of Oklahoma, in the above-styled matter, is hereby acknowledged this 6 day of June, 1946, same having been served within the time provided by the statutes of the State of Oklahoma.

E. L. Mitchell, Attorney for Oklahoma Tax Commission.

[fol. 53] Secretary's Certificate to foregoing transcript omitted in printing.

[fol. 54] [File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA

No. 32678

MAGNOLIA PETROLEUM COMPANY, a Corporation, Plaintiff in Error,

VS.

OKLAHOMA TAX COMMISSION, Defendant in Error

Syllabus

1. A lessee producing oil from lands of restricted Pottawatomie, Apache, Comanche, Otoe and Missouri Indians under departmental lease approved by and subject to supervision of the Secretary of the Interior of the United States, is engaged in the operation of a governmental instrumentality or agency and in the absence of permissive legislation by Congress, or appropriate Federal consent or waiver or withdrawal of immunity, the oil production or the oil as produced is not subject to the state gross production tax of five per cent of the value of the oil produced.

[fol. 55] Appeal from Oklahoma Tax Commission

From order assessing gross production and oil excise or proration taxes on certain oil production the Magnolia Petroleum Corporation appeals.

Order Reversed

Wallace Hawkins, Dallas, Texas; Robert W. Richards, Okla. City, Okla., for Plaintiff in Error.

E. L. Mitchell, Edmund J. Armstrong and C. W. King, of Oklahoma City, Okla., for Defendant in Error.

Opinion—Filed September 23, 1947

WELCH, J.:

This appeal tests the validity of certain tax assessments, the gross-production and oil excise tax, made against the Magnolia Petroleum Company for oil production under departmental leases on restricted lands or trusts title lands of Pottawatomie, Apache, Comanche, Otoe and Missouria Indians.

When the Commission served notice of such assessments the Company filed its protests, the several notices and protests being consolidated for hearing. After hearing the Commission entered its order sustaining the assessments and upon appropriate statute the company appeals to this court.

[fol. 56] The chief question, and as we not regard it/the controlling question is whether oil production under/such admitted circumstances is subject to the state tax involved.

This question was determined in 32270, The Texas Company vs. Oklahoma Tax Commission, this day decided. Here also we conclude that the rule of immunity specifically upheld by the Supreme Court of the United States is binding and conclusive. See Howard v. Gypsy Oil Co., 247 U. S. 504, 62 L. ed. 1239, and Large Oil Company v. Howard, 248 U. S. 549, 63 L. ed. 416.

Other questions are here presented by the Company, but we deem it unnecessary to discuss or consider them in view of this determination.

By virtue of the controlling force of the authorities cited we conclude that this oil production, or oil as produced, was not subject to the tax involved.

Therefore the order appealed from is reversed, with directions that the tax assessments involved be vac-ted. Hurst, C. J., Davison, V. C. J., Riley, Gibson, and Luttrell, concur. Corn, J., Dissents.

[fol. 57] File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA

[Title omitted]

Petition for Rehearing-Filed October 6, 1947

Comes now the Oklahoma Tax Commission, defendant in error, and respectfully represents to the court that on the 23rd day of September, 1947, a decree and judgment was rendered by this Court in said cause holding:

"1. A lessee producing oil from lands of restricted Pottawatomie, Apache, Comanche, Otoe and Missouri Indians under departmental lease approved by and subject to s-pervision of the Secretary of the Interior of the United States, is engaged in the operation of a governmental instrumentality or agency and in the absence of permissive legislation by Congress, or appropriate Federal consent or waiver or withdrawal of immunity, the oil production or the oil as produced is not subject to the state gross production tax of five per cent of the value of the oil produced."

[fol. 58] (1) That said decision overlooked a question decisive of the case, and duly submitted by counsel as follows:

That in order for a burden on an instrumentality of the Government to inhibit the collection of a uniform tax, such burden must be direct and substantial and actually hinder the operation of functions of the State Government in the performance of its duties.

- (2) That said decision is in conflict with the law, both State and Federal, to which the attention of the Court has not been called, either in brief or oral argument, or which has been overlooked by the court to the effect that theoretical burdens on governmental instrumentalities or agencies are no longer recognized by the Supreme Court of the United States to the extent that same prevents a state from levying and collecting the ordinary tax applying to other like persons.
- (3) That the said decision is erroneous in that it wrongfully and unlawfully deprives the State of Oklahoma of the exercise of the highest sovereign power, that of the power to raise revenues for the support of the state government which said power is supreme and cannot be impinged, curtailed or denied to the sovereign state on account of the laws, rules, regulations or other processes of the federal government. The court overlooked the fact that oil companies pay the same price for restricted leases for the production of oil, gas, and other minerals in the State of Okla-[fol. 59] homa that is paid for non-restricted leases, and therefore, the Indian, the ward of the government, is not penalized by the oil or gas developing contract or lease because of his restrictions. In most instances, as this court knows from common knowledge, the oil leases are initially bought by brokers or oil scouts depending solely upon the oil producing expectancy and at the time they are bought and the purchase price is made, it is not known whether

or not a given lease is taxable or nontaxable and therefore, the identical consideration for the annual lease money or bonus is paid for the lease on the restricted area as on the non-restricted tract.

We assume of course, that it was the intention of the court to restrict the opinion to restricted Indian properties under departmental lease and under supervision of the Secretary of the Interior and that it was not the intention of the court to hold that the inhibition operated against levying the taxes against the non-Indian interest, that is, the interest of Juana Pau-Kune, a non-restricted Mexican citizen having no Indian blood. One-third interest in the Pau-Kune lease, covered the N/2 NE/4 of Section 10-5-9, Caddo County, Oklahoma.

The same of course, applies to the one-fourth interest in the Kladaing allotment owned by non-Indian grantees of Mary Maleno as shown by photostatic copies of fee simple [fol. 60] patents issued by the United States, heirs of Mary Molena, devisees.

Wherefore, defendant in error prays that a rehearing of said cause may be granted by this Honorable Court and that the same be set down for oral argument and permission given to resubmit the questions involved to the consideration of the Court; that upon such consideration, the case be reversed.

Mac Q. Williamson, Attorney General. Fred Hansen, First Assistant Attorney General. C. W. King, General Counsel, Oklahoma Tax Commission, Attorneys for Defendant in Error.

[fol. 61]

Affidavit of Mailing

STATE OF OKLAHOMA, Oklahoma County, ss.:

Lucile Williams being duly sworn on oath, deposes and says that on the 6th day of October, 1947, she enclosed a copy of the attached Petition for Rehearing, in an envelope addressed to: Mr. Robert W. Richards, Attorney at Law, P.O. Box 1828, Oklahoma City, Oklahoma, with postage thereon fully prepaid, and deposited the same in the United

States post office at the State Capitol, in Oklahoma City, Oklahoma.

Lucile Williams.

fol. 62] Subscribed and sworn to before me this 6th day of October, 1947. Effa Alexander, Notary Public. My commission expires October 28, 1948. (Seal.)

[fol. 63], [File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA

ORDER DENYING PETITION FOR REHEARING—Filed February 27, 1948

The Clerk is hereby directed to enter the following orders.

32,678—Magnolia Petroleum Co. v. The Oklahoma Tax
Commission. Petition For Rehearing is Denied.

Thurman S.-Hurst, Chief Justice,

[fol. 64].

[File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA

[Title omitted]

MOTION FOR ORDER STAYING MANDATE

Comes now the defendant in error, Oklahoma Tax Commission, in the above entitled cause, and respectfully shows to the court that defendant in error desires to appeal to the Supreme Court of the United States from the decision of this court rendered herein on the 22nd day of January, 1948, and from Order overruling petition for rehearing entered January 27, 1948, and that said defendant in error, Oklahoma Tax Commission, desires that the mandate in said cause be stayed pending such appeal.

Wherefore, defendant in error, Oklahoma Tax Commission, prays the court to enter an Order herein staying the mandate in said above styled cause pending the appeal

herein of defendant in error to the Supreme Court of the

United States.

Mac Q. Williamson, Attorney General; Fred Hansen, Assistant Attorney General; C. W. King, Gen-[fol. 65] eral Counsel for Oklahoma Tax Commission, Attorneys for Defendant in Error.

Affidavit of Mailing

STATE OF OKLAHOMA,
Oklahoma County; ss:

C. W. King, being first duly worn upon his oath states that he is one of the attorneys for the above named defendant in error; that on January 29, 1948, he enclosed a copy of the above Motion to Stay Mandate in an envelope addressed to Mr. Robert W. Richards, one of the attorneys for the above named plaintiff in error, at his office in care of the Legal Division of the Magnolia Petroleum Company, Box 1828, Oklahoma City, Oklahoma, and deposited the same, with postage thereon paid, in the United States post office at Oklahoma City, Oklahoma.

C. W. King.

Subscribed and sworn to before me this 29th day of January, 1948. Ann Fannin, Notary Public. My Commission Expires: Apr. 8, 1950. (Seal.)

[fol. 66] [File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA

ORDER STAYING MANDATE-Filed February 10, 1948

The Clerk is hereby directed to issue the following orders:

32270—The Texas Co. v. Oklahoma Tax Commission, 32678—Magnolia Petroleum Co. v. Oklahoma Tax Commission,

Ordered that mandate in the above styled causes be stayed until April 29, 1948, pending appeal to the U. S. Supreme Court, and thereafter until Final disposition by that court if appeals are perfected within time allowed.

Thurman S. Hurst, Chief Justice.

[fol. 67]

[File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA

[Title omitted]

Petition for Allowance of Appeal and Prayer for Reversal—Filed February 19, 1948

To the Honorable Chief Justice of the Supreme Court of the State of Oklahoma:

Your appellant in the above entitled cause, and appellees and defendant in error in the cause in the Supreme Court of Oklahoma, hereinafter referred to, considering themselves aggrieved by the final decision and judgment of the Supreme Court of Oklahoma, entered on the 23rd day of September, 1947, which said judgment became final upon the overruling of petition for rehearing on the 27th day of January, 1948, in the cause entitled;

[fol. 68] "The Magnolia Petroleum Company, a corporation, plaintiff in error, vs. Oklahoma Tax Commission, defendant in error, No. 32678."

on the docket of said court, reversing the order and judgment of the District Court of Oklahoma County, Oklahoma hereby files its petition for an appeal from said decision and judgment to the Supreme Court of the United States.

In the above entitled cause in the Supreme Court of/Oklahoma there is drawn in question the validity of statutes of the State of Oklahoma, to-wit: Sections 821 to 843 inclusive, Ch. 20, Title 68, Okla. Stat. 1941, as amended by Ch. 20, 1947 Supl. to Stat. 1941, on the ground that said statutes are invalid as applied to the plaintiff in error below and the appellee herein and are, as enforced, in violation of the Acts of Congress which the appellee urged operated to make exempt and immune from taxation production of oil and gas from restricted Indian leases, particularly the General Allotment Act of the United States of America. approved February 8, 1887, Chapter 119, 24 Statute, 388. and Acts amendatory thereof, and the Act of Congress March 3, 1935, Ch. 781 and 783, that the said 7/8 working interest of the Magnolia Petroleum Company, lessee of restricted Indian lands, was immune from taxation by the State of Oklahoma and that the state's efforts to collect.

a gross production tax from said lessee, the Magnolia Petroleum Company, was in violation of the 14th Amendment of the Constitution of the United States of America. [fol. 69] in that each of said leases constituted an instrumentality of the Government of the United States and was, therefore, exempt and immune from state taxation as applied to the Oil Company lessee. The judgment and decision of the Supreme Courte of Oklahoma sustained said position of the taxpayer and held said tax invalid and in contravention of the Acts of Congress as interpreted by the decisions of this court; and such decision of the State Court operated to deprive the State of Oklahoma as represented by the Oklahoma Lax Commission as its officers. and agents, of the right to leve and collect the gross production tax on oil and gas derived from the operation of the said Magnelia Petroleum Company, lessee, under restricted Indian Oil leases, which said decision denied to the State of Oklahoma and the appellant herein, its sovereign rights guaranteed under the Enabling Act admitting the State of Oklahoma to statehood and the provisions of the State Constitution of Oklahoma, adopted pursuant thereto, and sporates the rights of the State of Oklanoma as guaranteed under the Constitution of the United States in that it deprives the State of Oklahoma of its sovereign power of taxation as related to the subject matter of this litigation; that said decision is repugnant to treaties and laws of the United States relating to the Osage Tribe of Indians and should be reviewed by this court of appeal.

The decision and final judgment of the Supreme Court of Oklahoma herein appealed from, were in favor of the validity of the said Statute of the State of Oklahoma as applied to the oil and gas produced from restricted Indian lands by the Magnolia Petroleum Company, as lessee. [fol. 70] The Supreme Court of Oklahoma is the highest court of the state of Oklahoma in which a decision of the issues of this cause could be obtained.

Appellant shows that this case is one in which, under the legislation in force to-wit: Sec. 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U.S.C. Secs. 344 (a), and 861 (a), a review may be made in this court as a matter of right by appeal.

This appeal is accompanied by an assignment of errors setting forth the grounds upon which the decision and judgment of the Supreme Court of Oklahoma should be reversed and a statement particularly disclosing the basis on which it is contended that the Supreme Court of the United States has jurisdiction to review said decision and judgment of the Supreme Court of Oklahoma.

Wherefore, your appellant prays that an appeal may be allowed herein from the Supreme Court of Oklahoma to the Supreme Court of the United States in order that said decision and judgment of the Supreme Court of Oklahoma may be examined and reversed; that a transcript of the material part of the record in said cause, duly authenticated may be ordered to be prepared and certified to the Supreme Court of the United States as provided by law; that an order may be made fixing the security to be required of appellant (or excepting appellant from such requirement on the ground that this is a suit for and on behalf of the [fol. 71] state of Oklahoma): that such security for cost as may be required in lieu of bond and tendered herewith may be approved; and that there be issued to appellee a citation directing said appellee to appear in the Supreme. Courf of the United States at Washington, D. C., within forty days from the date hereof and there show cause, if any there be, why said decision and judgment should not be reversed and speedy justice be done the parties in that behalf.

Mac Q: Williamson, Attorney General; Fred-Hanson, Assistant Attorney General; C. W. King, General Counsel, Oklahoma Tax Commission

STATE OF OKLAHOMA,
Oklahoma County, ss:

Service of the foregoing petition for appeal was made upon counsel of record for the Texas Company, plaintiff in error herein and appellee in this appeal by depositing in the United States Post Office at Oklahoma City, postage prepaid, a copy of this petition clearly addressed to said counsel to wit: Robert W. Richards, Box 1828, Oklahoma City, Oklahoma, this 19th day of February, 1948.

C. W. King.

[fol. 72] Subscribed and sworn to before me the undersigned notary public this 19th day of February, 1948. W. F. Lemons, Assistant Clerk. (Seal.)

[fol. 73] ... [File endorsement omitted.]

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

Assignment of Errors-Filed February 19, 1948

The appellant, Oklahoma Tax Commission, for its assignment of error herein says that the Supreme Court of Oklahoma in its decision and judgment in the cause entitled: "Magnolia Petroleum Company, a corporation, plaintiff in error, vs. Oklahoma Tax Commission, defendant in error. No. 32678," erred in its order and decision reversing the judgment of the Oklahoma Tax Commission, in cases No. 1748 to 1751 inclusive, wherein the Tax Commission entered its order and judgment sustaining the levy and collection of the State gross production tax on oil and gas, as applied to the oil company lessee and producer.

Upon review of such order and judgment of the Oklahoma Tax Commission, the Supreme Court of Oklahoma erred in each of the following particulars and in each particular, appellant was deprived of its just rights on behalf of the State of Oklahoma and was denied the exercise of the sov-[fol. 74] ereign powers of taxation guaranteed under, the

Constitution of the United States:

- (1) The Supreme Court of Oklahoma erred in reversing the order and judgment of the Oklahoma Tax Commission and by holding the Oklahoma Statute levying the gross production tax on oil, gas and other minerals did not apply to the 7/8 working interest in the oil and gas produced by the Magnolia Petroleum Company and belonging to it; for the reason that the said production came from so-called restricted Indian lands and was, therefore, immune from State taxation.
- (2) Said court erred in reversing the order and judgment of the Oklahoma Tax Commission for the reason that the United States Government has no title, ownership or property interest in the subject matter of this litigation which would operate to make the levying and the collection of the Oklahoma gross production tax on oil and gas an unlawful burden upon any agency or instrumentality of the United States Government, in that the levying and collection of

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said tax in no wise buildens the Government of the United States directly or indirectly.

- (3) The Supreme Court of Oklahoma erred in reversing the said judgment of the District Court of Oklahoma County by holding:
 - Pottawatomie, Apache, Comanche, Otoe and Missouri Indians under departmental lease approved by and subject to supervision of the Secretary of the Interior of the United States, is engaged in the operation of a governmental instrumentality or agency and in the absence of permissive legislation by Congress, or appropriate Federal consent or waiver or withdrawal of immunity, the oil production or the oil as produced is not subject to the state gross production tax of five per cent of the value of the oil produced."
- [fol. 75] (4) The Supreme Court of the State of Oklahoma erred in reversing the judgment of the Oklahoma Tax Commission in holding that the departmental leases described in plaintiff's petition constituted such Federal agencies or instrumentalities as are immune from taxation to the lessee on the ground that such taxation would burden the arm of the Federal Government in the administration of the affairs of the Indian and thereby impair his fortune and so weaken the arm of the Federal Government in discharging an obligation to its ward.
- (5) The Supreme Court of Oklahoma erred in refusing to hold upon the urgency of the appellant, Oklahoma Tax Commission, that the Magnolia Petroleum Company could not be heard and had no standing in court to maintain an action for the recovery of taxes based upon the theory that to tax the oil company on its oil and gas production from an Indian lease would burden (not the Indian nor the oil company) but would so burden the United States Government by impinging upon the exercise of the government over a federal agency or instrumentality to the extent of interfering with the government in administering the Indian's estate.
- (6) The judgment and decision of the Supreme Court of Oklahoma reversing the judgment of the Oklahoma Tax

Commission was erroneous in that it applied the federal instrumentality or federal agency doctrine of inhibition against the State of Oklahoma and the Oklahoma Tax Commission after all of the cases, both state and federal, so applying such doctrine as to arrest the taxing power of the state in that particular, had been either directly, or by plain implication, overruled by the Supreme Court of the United States.

- Ifol 761 (7) The judgment of the Supreme Court of the State of Oklahoma was erroneous and prejudicial and damaging to the interest of the State of Oklahoma and the Oklahoma Tax Commission in that it deprived the state of its sovereign taxing power guaranteed under the treaty of the Louisiana Purchase and further guaranteed by the Constitution of the United States and for the further reason that the said decision of the Supreme Court of Oklahoma places the State of Oklahoma in a position of inferiority and impotency as compared with the sister states of the Union, in that to so deprive the State of its sovereign taxing power, operates to deprive said state of its admission to, and place in, the Union of the United States on an equal basis with the original thirteen states.
- (8) The opinion of the Supreme Court of the State of Oklahoma and its decree were erroneous and prejudicial to the rights of the State of Oklahoma and the Oklahoma Tax Commission, appellant herein, in that said opinion incorrectly and erroneously construed the Acts of Congress and the decisions of the State and Federal Courts, including recent cases of the Supreme Court of the United States, in which the doctrine of federal instrumentality and federal agency has been modified so that in order for a axpayer to avoid taxes on such ground, it must be shown that the tax, in point of fact as opposed to theory, actually and substantially burdens the arm of the government of the United States in administering such instrumentality or agency, and that it is not enough to merely show that the subject of taxa-[fol. 77] tion is comprised of property over which the government is exercising a form of superintendence and supervision.

For each of the errors specified above and because in each of said respects, the said judgment of the Supreme Court of Oklahoma in reversing the order and judgment of the Oklahoma Tax Commission, deprives appellant and the State of Oklahoma of its property without due process of law, and deprives it of the equal protection of the law and denies to it the exercise of equal sovereign powers with the original states, in violation of the treaty of the Louisiana Purchase and the provisions of the Constitution of the United States; and for the reason that said judgment violates the General Allotment Act and the various other Acts of Congress, alloting to said Indians the properties from which the oil and gas was produced; and for such reasons appellant prays that said decision and judgment be reviewed by the Supreme Court of the United States and be there reversed and judgment rendered in favor of the appellant, Oklahoma. Tax Commission, on behalf of the State of Oklahoma.

Mac Q. Williamson, Attorney General; Fred Hansen, Asst. Attorney General; C. W. King, General Counsel, Oklahoma Tax Commission.

fols. 78-85] STATE OF OKLAHOMA, Oklahoma County, ss:

Service of the foregoing assignment of errors was made upon counsel of record for the Texas Company, plaintiff in error herein and appellee in this appeal, by depositing in the United States Post Office at Oklahoma City, postage prepaid, a copy of this petition clearly addressed to said counsel to-wit: Robert W. Richards, Box 1828, Oklahoma City, Oklahoma, this 19th day of February, 1948.

C. W. King, General Counsel, Oklahoma Tax Commission.

Subscribed and sworn to before me the undersigned notary public this 19th day of February, 1948. Ann Fannin, Notary Publica My Commission expires Apr. 8, 1950. (Seal.)

[fol. 86]

[File endorsement/omitted].

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL-Filed February 19, 1948

The petition of the Oklahoma Tax Commission for an appeal in the above case (being case No. 32678 styled the Magnolia Petroleum Company, a corporation, plaintiff in error, vs. Oklahoma Tax Commission, defendant in error, upon the docket of the Supreme Court of the State of Oklahoma) to the Supreme Court of the United States from the Supreme Court of the State of Oklahoma, and the assignments of error and the jurisdictional statement required by the rules of the Supreme Court of the United States having been filed herewith, and having been presented, and having been considered, together with the record of said cause, it is

Ordered, that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the [fol. 87] Supreme Court of the State of Oklahoma, as prayed in said petition, and that the Clerk of the Supreme Court of the State of Oklahoma prepare and certify a transcript of the record and proceedings in the above cause and transmit to the Supreme Court of the United States so that same shall be delivered to said court within forty days from

the date thereof.

And the appellant, having presented to the Chief Justice of the Supreme Court of Oklahoma, good and sufficient security for cost, condition that appellant prosecute such appeal to effect (or having been excepted from the rule requiring security on account of said cause being prosecuted on behalf of the State of Oklahoma) and that it said appellant fails to make their plea good, they shall answer and pay all cost; and said bond or security for cost having been declared unnecessary in this case on account of said ease being prosecuted on behalf of the State of Oklahoma in its sovereign capacity, no cost bond or other like security having been deemed necessary, none is required.

The appeal shall operate as a supersedeas, and the mandate of this court is hereby stayed and the effectiveness of the judgment and order appealed from is hereby stayed pending the final determination of said appeal.

Dated this the 19th day of February, 1948.

Thurman S. Hurst, Chief Justice of the Supreme Court of Oklahoma: (Seal.)

Attest: Andy Payne, Clerk.

[fol. 88] STATE OF OKLAHOMA, Oklahoma County, ss:

C. W. King of lawful age being first duly sworn deposes and says, that he served the foregoing order upon the counsel of record for the Magnolia Petroleum Company, plaintiff in error, in this court and appellee in the Supreme Court of the United States by depositing in the Post Office at Oklahoma City, with the correct amount of postage thereon, a letter containing a copy of said order correctly addressed to said counsel to-wit: Robert W. Richards, Attorney of record for appellee, Box 1828, Oklahoma City, Oklahoma.

C. W. King

Subscribed and sworn to before me this 19 day of February, 1948. W. F. Lemons, Assistant Clerk. My Commission expires: ———. (Seal.)

[fols. 89-93] Citation in susual form showing service on Robert W. Richards, filed Feb. 19, 1948, omitted in printing.

[fol. 94] [File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA,

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed February 19,

To the Clerk of the Above Named Court:

You are hereby requested to make a transcript of the record in the above styled and numbered cause to be filed in the Supreme Court of the United States pursuant to an appeal allowed in said cause, and to include in such

transcript of the record the following, and no other, papers and exhibits, to-wit:

A full and complete transcript of the record certified to the Supreme Court of Oklahoma by the Oklahoma Tax Commission under date of June 21, 1946, and filed in the Su-[fol. 95] preme Court of Oklahoma, with petition in error attached, on June 26, 1946, including the following:

- 1. Petition in Error.
- 2. Amendment to Petition.
- 3. Court Minutes.
- 4. Journal Entry of Judgment.
- 5. Statement as to Contents of Case-Made.
- 6. Certificate of Court Clerk.
 - 7: Certificate of Trial Judge.
- 8. Exhibits attached to pleadings.
- 9. Notice of intention to file suit for recovery of taxes.
- 10. Complete transcript and Case Made (except as omitted by indication).
 - 11. Petition for Rehearing.
 - 12. All Stipulations.
 - 13. Final Opinion and Decision of the Supreme Court.
 - 14. Motion for Stay of Mandate.
 - 15. Order Staying Mandate.
- 16. Petition for Appeal and Prayer for Reversal with Proof of Service.
 - 17. Asignment of Errors with Proof of Service.
 - 18. Jurisdictional Statement with Proof of Service.
 - . 19. Order Allowing Appeal with Proof of Service.
- 20. Citation to Appellee with Proof of Service.

 [fol. 96] 21. Praecipe for Transcript of Record with Proof of Service.
- 22. Statement of Points to be Relied upon, with Proof of Service.
- 23. A full, complete and accurate index of the record required by this praccipe.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the Supreme Court of the United States, and to be filed in the office of the Clerk of the Supreme Court of the United States on or before the 29th day of April, 1948.

Nac Q. Williamson, Attorney General; Fred Hansen, First Asst. Attorney General; C. W. King, General Counsel, Oklahoma Tax Commission. [fol. 97] STATE OF OKLAHOMA, Oklahoma County, ss:

C. W. King of lawful age first being duly sworn deposes and says that he deposited in the Post Office at Oklahoma City, with correct amount of postage thereon, a copy of this Praecipe addressed to Robert W. Richards, Box 1828, Oklahoma City, Oklahoma, on this the 19th day of February 1948.

Subscribed and sworn to before me this 19th day of February, 1948. Ann Fannin, Notary Public. My Commission expires April 8, 1950. (Seal.)

[fol. 98] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ACKNOWLEDGMENT OF SERVICE-Filed February 19, 1948

Service is acknowledged of:

Praecipe for Transcript of Record

Assignment of Errors

Citation on Appeal

Statement Directing Attention to Rule

Statement Directing Attention to Paragraph 3 of Rule 12 of the Court

Order Allowing Appeal

Statement as to Jurisdiction; all as of February 19, 1948. Robert W. Richards, Attorney of Record for Appellee.

[fol. 99] [File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA

[Title omitted]

STIPULATION AND DESIGNATION AS TO CONTENTS OF RECORD-Filed February 19, 1948

It is stipulated and Agreed by the parties hereto that the following instruments and exhibits shall be included in the

record on the appeal to the Supreme Court of the United States:

1. All pleadings, motions, stipulations and orders.

2. That only the exhibits appearing at the following enumerated pages shall be included in said record: 12, 13, 19, 20, 40, 41, 44, 45, 46, 52, 53, 54, 55, 57, 64, 65, 67, 69, 74, 78, 83, 85, 87, 89, 96, 109, 112, 114, 119, 121, 122, 123, 125, 129, 142-146, inclusive and 160.

[fol. 100] It is Further Stipulated and Agreed between the parties that the other trust patents which have been omitted from this record by agreement are substantially the same as that which appears at page 12 of the record and is included herein;

and that, the other oil and gas leases which have been omitted from the record by agreement are substantially the same as that appearing at page 13 and included herein, all of said oil and gas leases having been executed upon the same Departmental oil and gas lease form.

Dated this 18 day of Feb. 1948.

Robert W. Richards, Attorney for Magnolia Petroleum Company. C. W. King, General Counsel for Oklahoma Tax Commission.

[fol. 101]

"EXHIBITS"

[fol. 102]

Ехнівіт "А"

J. Frank Martin, Chairman; J. D. Dunn, Vice Chairman R. H. Sibley, member f. H. D. Canfield, Secretary

OKLAHOMA TAX COMMISSION, STATE OF OKLAHOMA Oklahoma City, June 5th, 1944, Gross Production Division.

REGISTERED

Magnolia Petroleum Company, Magnolia Building, Dallas Texas.

GENTLEMEND.

You are hereby notified that the Oklahoma Tax Commission, in accordance with the provisions of Section 22, Article 2, Chapter 66 of the Oklahoma Session Laws of 1939, proposes to assess gross production tax and penalty and prora-

tion tax and penalty upon you and separately, upon each of your interests in leases for the period June 1st, 1942, to March 31, 1944, both inclusive, as particularly set out in detailed tax statements hereto attached and made a part hereof in amounts upon each lease as therein set out, to wit.

(Continued)

Remittances should be made payable to the Oklahoma Tax Commission and refer to Division.

flor. roof	Gross Production Tax
Lease Name and	Tax Penalty to Total Tax
Description	Tax 6-1-1944 and Penalty
Frank Davis	
N/2 NE/4 Section	
15-7-4	200 00 101 010 50
Rottawatomie County, Oklahom	a \$1,599.58 320.00 \$1,919.58
3/4 interest in the	6
Kla-da-ing lease N/2	
NW/4 SW/4 Section 3-5-9	· 60 00 00 00 117 00
Caddo County, Oklahema	125.90 21.93 147.83
Joseph Nona	
NW/4 Section 11-7-4	and the second s
Pottawatomie County, Oklahom	a 1,390.49 306.52 1,697.01
2/3 interest in the	dia n
Pau Kune lease N/2	b0
NE/4 Section 10-5-9	
Caddo County, Oklahoma	2,006.17 12,176.64
Harry Saunders	
N/2 SW/4 Section 4-22-3	
Pawnee County, Oklahoma	792 16 141 94 934 10
Tissoyo	
SE/4 Section 22-1S-9W	
Stephens County, Oklahoma	668.78 116.92 785.70
Nicholas Vieux	0
W3/4 of W/2 W/2 SE/4	
Section 13-7-4	
Pottawatomie County, Oklahom	a 219.74 38.77 258.51
the state of the s	
TOTALS	\$14,967.12 \$2,952.25 \$17,919:37

(Continued)

Ife		
	104	

		1. 8-
Lease Name and	Penalty to	Total Tax
Description	Tax 6-1-1944 a	nd Penalty
Frank Davis		
N/2 NE/4 Section 15-7-4	• 1	
Pottawatomie County, Oklahoma	\$31.31 \$6.48	\$37.79
3/4 interest in the		
Kla-daving lease N/2		
NW/4 SW/4 Section 3-5-9		1 4
Caddo County, Oklahoma	2.53 .45	: 2.98
Joseph Nona	1	
NW/4 Section 11-7-4		
Pottawatomie County, Oklahoma	. 27.75 6.29	34.04
2/3 interest in the Pau		77 60.1.
Kune lease N/2 NE/4		No.
Section 10-5-9		
Caddo County, Oklahoma	211.50 43.41	254.91
Harry Saunders		
N/2 SW/4 Section 4-22-3		
Pawnee County, Oklahoma	14,71 . 2.75	17:46
Tissoyo		
SE/4 Section 22-18-9W		
Stephens County, Oklahoma	14.09 2.60	16.69
Nicholas Vieux	•	
W 3/4 of W/2 W/2 SE/4		45 1.
Section 13-7-4		
Pottawatomie County, Oklahoma	4.37	5.18
TOTALS	\$306.26 \$62.79	\$369.05
	* 1	
• • • • • • • • • • • • • • • • • • • •		*

(Continued)

[fol. 105] Section 22, Article 2, Chapter 66, Session laws of 1939, further provides that within thirty (30) days after the mailing of the notice provided for, the taxpayer may file with the Tax Commission a written protest under oath, signed by himself or his duly authorized agent, setting out the information required in Paragraph 3 of that Section and this Section further provides:

"If in such written protest the taxpayer shall request an oral hearing, the Tax Commission shall grant such hearing, and shall, by written notice advise the taxpayer of a date, which shall not be less than ten (10) days from the date of mailing of such written notice, when such taxpayer may appear before the Tax Commission and present arguments and evidence, oral or written, in support of its protest.

If any taxpayer fails to file such written protest within the period of thirty (30) days, as provided by this Section, then the Tax Commission shall immediately proceed to assess the tax and no appeal to the Supreme

Court from the Order of the Tax Commission assessing such tax shall be allowed under Section 26 of this Act; provided, the Tax Commission shall, for good cause shown, have authority to extend the period of thirty (30) days within which any taxpayer must; file a protest."

You are notified that the Oklahoma Tax Commission proposes to assess the amount of tax and penalties designated above. Provision is included for your rights and privileges.

Yours very truly, Oklahoma Tax Commission, by J. Frank Martin, Chairman.

WS.

LLL:ws;mj.

[fol. 106]

(Copy)

Ехнівіт "В"

BEFORE THE OKLAHOMA TAX COMMISSION

Case No. 1748

In the Matter of the Protest of Magnolia Petroleum Company, a Corporation, Against the Assessment of Gross Production and Proration Taxes on Production from Wild Tribes Indian Leases.

Protest

Comes now the Magnolia Petroleum Company, a corporation and, in response to the demand of the Oklahoma Tax Commission made under date of June 5, 1944, for the payment of gross production tax and penalty, and proration tax and penalty on the lessee's share of oil and gas produced during the period from June 1, 1942, to March 31, 1944, both inclusive, from the seven (7) tracts of land known as Wild Tribes Indian Leases and situated in Caddo, Pawnee, Pottawatomie and Stephens Counties, State of Oklahoma, more particularly described as follows:

Frank Davis, N/2 NE/4 of Sec. 15-7N-4E, Pottawatomie County, Oklahoma;

3/4ths Interest in the Kla-da-ing Lease, N/2 NW/4 SW/4 of Section 3-5N-9W, Caddo County, Oklahoma;

Joseph Nona, NW/4 of Sec. 11-7N-4E, Pottawatomie County, Oklahoma;

[fol. 107] 2/3 Interest in the Pau-Kune Lease, N/2 NE/4 of Section/10-5X-9W, Caddo County, Oklahoma;

Harry Saunders, N/2 SW/4 Sec. 4-22N-3E, Pawnee County, Oklahoma;

Tissoyo, SE/4 of Sec. 22-18-9W, Stephens County, Oklahoma;

Nicholas Vieux, W 3/4 of W/2 W/2 SE/4, Sec. 13-7N-4E, Pottawatomie County, Oklahoma.

respectfully shows to the Tax Commission:

T

That the claim asserted by the Tax Commission, in the total sum of \$18,288.42, is without merit in that the leases here involved are leases on the lands of restricted Indians, and that the leases and lessees thereof are Federal instrumentalities and not subject to the gross production tax or proration tax laws of the State of Oklahoma; and in that connection the protestant alleges that the Congress of the United States has never consented to the imposition of a gross production or proration tax by the State of Oklahoma upon the production from those leases, and by reason thereof, the State is without authority to levy such a tax thereon.

The protestant further states that the proposed assessment would violate the provisi-ns of the Federal and State Constitutions and the Enabling Act under which the State [fol. 108] of Oklahoma was admitted to the Union.

 Π

That the protestant has heretofore, during the period from June 1, 1942, to March 31, 1944, filed, from time to time and in all respects in the manner provided by law, its report with the Tax Commission of the State of Oklahoma. in all of which reports all of the production from the above-na-ed leases, during the period of time involved herein, was set forth and specifically claimed as being exempt from the

gross production and proration tax laws of the State of Oklahoma.

H

That under certain well-known decisions of the Supreme Yourt of the United States and the Supreme Court of the State of Oklahoma, the State laws relating to the gross production and proration taxes have no application whatsoever to the leases on the lands of restricted members of the so-galled Wild Tribes of Indians, or to oil or gas produced That the protestant has heretofore in the utmost good faith, acting upon the above-mentioned controlling decisions as being the law of the land, and by reason thereof, paid ad valorem taxes in lieu of gross production taxes. That those decisions have long been regarded by the administrative, legal, and executive officers of the State as being in all respects binding upon the State and County [fol 109] authorities; and the protestant states that those decisions have not to this date been modified; reversed or overruled.

IV

The protestant further states that in addition to the abovementioned controlling decisions, the Legislature of the State of Oklahoma, in the laws enacted in the year 1925, thapter 20, Section 3 (68 O. S. A., Sec. 832) took cognizance of the exempt character of the oil and gas produced from the lands here involved, in the following legislative enactment, namely:

"In all cases of overpayment, duplicate payment of payment made in error on account of the production being derived from restricted Indian lands and therefore exempt from taxation, the State Auditor, by and with the approval of the State Board of Equalization, after an audit by the State Examiner and Inspector, is authorized to refund any such overpaid, duplicate or erroneously paid gross production taxes out of any gross production tax funds in his hands from the same county from which the original tax was derived and not apportioned to the State Treasurer to be distributed as provided by law."

and that the attempt here made by the Tax Commission to collect gross production and proration taxes on oil and gas

produced from leases on the lands herein involved violates the provisions of the above-named statute and the provisions. [fol. 110] of the State and Federal authorities.

V

That the State of Oklahoma is without jurisdiction and the Gross Production and Proration Tax Statutes have no application to the leases or to the oil and gas produced from the lands herein involved, for the reason that they are under the exclusive jurisdiction of the United States.

Wherefore, Protestant respectfully requests that it be granted a hearing before the Oklahoma Tax Commission, for the presentation of evidence and argument in support of this protest, and prays that the claim herein-asserted by dismissed.

Magnolia Petroleum Company, by — , Its Attorney.

STATE OF OKLAHOMA, Oklahoma County, ss:

Robert W. Richards, of lawful age, being first duly sworn, upon oath states, that he is the attorney for the Protestant, [fol. 111] Magnolia Petroleum Company, in the foregoing protest; that he is duly authorized by the Protestant to verify this protest on its behalf; that he has read the foregoing protest and that the statements and allegations therein made are true and correct, as he verily believes.

Subscribed and sworn to before me this 1st day of July, 1944. _____. My Commission Expires:

RWR:1

Receipt of the foregoing protest is acknowledged this 1st day of July, 1944.

⁽S.) A. L. Herr, Attorney for the Oklahoma Tax Commission.

Ехнівіт "А"

[for. 112]

J. Frank Martin, Chairman; J. D. Dunn, vice-chairman R. M. Sibley, Member H. D. Canfield, secretary

Gross Production Division.

(Seal).

OKLAHOMA TAX COMMISSION, STATE OF OKLAHOMA

Oklahoma City, June 5, 1944

Registered

Magnolia Petroleum Company Magnolia Building Dallas, Texas

Gentlemen:

Pawnee County, Oklahoma

TOTALS

You are hereby notified that the Oklahoma Tax Commission, in accordance with the provisions of Section 22, Article 2, Chapter 66 of the Oklahoma Session Laws of 1939, proposes to assess gross production tax and penalty and proration tax and penalty upon you and upon your interest in the Robedeaux lease for the period June 1st, 1942 to March 31st, 1944, both inclusive, as particularly set out in a detailed tax statement hereto attached and made a part hereof, in amounts upon your interest in the lease as therein set out, to-wit:

(Continued)

[fol. 113]	Gross Production Tax							
Lease Name and Description		Tax	Penalty to 6-1-1944	Total Tax and Penalty				
R. H. Robedeaux S E Section 32–23–3 Pawnee County, Oklahoma		\$249.67	\$53.72	\$303.39				
TOTALS		\$249.67	\$53.72	\$303.39				
[fol. 114]	(Contin		Proration Tax					
Lease Name and Description		Tax	Penalty to 6-1-1944	Total Tax and Penalty				
R. H. Rosedeaux S E Section 32-23-3		7	. 44					

(Continued)

\$4:90

\$4.90

\$1.08

\$1.08

\$5.98

\$5.98

[fol. 115] Section 22, Article 2, Chapter 66, Session Laws of 1939, further provides that within thirty (30) days after the mailing of the notice provided for, the taxpayer may like with the Tax Commission a written protest under oath, signed by himself or his duly authorized agent, setting out the information required in Paragraph 3 of that Section and this section further provides:

"If in such written protest the taxpayer shall request an oral hearing, the Tax Commission shall grant such hearing, and shall by written notice, advise the taxpayer of a date, which shall not be less than ten (10) days from the date of mailing of such written notice when such taxpayer may appear before the Tax Commission and present arguments and evidence, oral or written, in support of its protest.

If any taxpayer falls to file such written protest within the period of thirty (30) days, as provided by this section, then the Tax Commission shall immediately proceed to assess the tax and no appeal to the Supreme Court from the Order of the Tax Commission assessing such tax shall be allowed under Section 26 of this Act; provided, the Tax Commission shall, for good cause shown, have authority to extend the period of thirty (30) days within which any taxpayer must file a protest.

You are notified that the Oklahoma Tax Commission proposes to assess the amount of tax and penalties designated above. Provision is included for your rights and privileges.

Yours very truly, Oklahoma Tax Commission, By J. Frank Martin, Chairman.

LLL:ws:mj.

[fol. 116]

Ехнівіт "В"

BEFORE THE OKLAHOMA TAX COMMISSION

Case No. 1749

In the Matter of the Protest of Magnolia Petroleum Company, a Corporation, Against Assessment of Gross Production and Proration Taxes on Production from Wild Tribes Indian Leases

PROTEST

Comes now the Magnolia Petroleum Company, a corporation, and, in response to the demand of the Oklahoma Tax Commission made under date of June 5, 1944, for the payment of gross production tax and penalty, and proration tax and penalty on the lessee's share of oil and gas produced during the period from June 1, 1942, to March 31, 1944, both inclusive, from the following tract of land, known as a Wild Tribes Indian Lease and situated in Pawnee County, State of Oklahoma, and more particularly described as R. H. Robedeaux Lease—The SE/4 of Section 32-23N-3E, in Pawnee County, Oklahoma, respectfully shows to the Tax Commission:

[fol. 117]

I

That the claim asserted by the Tax Commission in the total sum of \$309.37 is without merit in that the lease here involved is a lease on the land of a restricted Indian, and the lease and lessees thereof are Federal instrumentalities and not subject to the Gross Production Tax or Proration Tax Laws of the State of Oklahoma; and in that connection the protestant alleges that the Congress of the United States has never consented to the imposition of a gross production or proration tax by the State of Oklahoma upon the production from such leases, and by reason thereof, the State is without authority to levy such a tax thereon.

The Protestant further states that the proposed assessment would violate the provisions of the Federal and State Constitutions and the Enabling Act under which the State of Oklahoma was admitted to the Union.

That the Protestant has heretofore, during the period from June 1, 1942, to March 31, 1944, filed, from time to time and in all respects in the manner provided by law, its reports with the Oklahoma Tax Commission, in all of which reports all of the production from the above-named lesse, during the period of time involved herein, was set forth and specifically claimed as being exempt from the Gross Production and Proration Tax Laws of the State of Oklahoma.

[fol. 118] III

That under certain well-known decisions of the Supreme Court of the United States and the Supreme Court of the State of Oklahoma, the State laws relating to the gross production and proration taxes have no application whatsoever to the leases on lands of restricted members of the so-called Wild Tribes of Indians, or to oil or gas produced therefrom. That the Protestant has heretofore in the utmost good faith, acting upon the above-mentioned controlling decisions as being the law of the land, and by reason thereof, paid as valorem taxes in lieu of gross production taxes. That those decisions have long been regarded by the administrative, legal, and executive officers of the State as being in all respects binding upon the State and County authorities; and the Protestant states that those decisions have not to this date Been modified, reversed or overruled.

10

The Protestant further states that in addition to the above-mentioned controlling decisions, the Legislature of the State of Oklahoma, in the laws enacted in the year 1925, Chapter 20, Section 3 (68 O. S. A., Sec. 832) took cognizance of the exempt character of the oil and gas produced from the lands here involved, in the following legislative enactment, namely:

[fol. 119] "In all cases of overpayment, duplicate payment or payment made in error on account of the production being derived from restricted Indian lands and therefore exempt from taxation, the State Auditor, by and with the approval of the State Board of Equalization, after an audit by the State Examiner and Inspector, is authorized to refund any such overpaid,

duplicate or erroneously paid gross production taxes out of any gross production tax funds in his hands from the same county from which the original tax was derived and not apportioned to the State Treasurer to be distributed as provided by law,"

and that the attempt here made by the Tax Commission to collect gross production and proration taxes on oil and gas produced from the lease on the land herein involved violates the provisions of the above-named statute and the provisions of the State and Federal authorities.

V

That the State of Oklahoma is without jurisdiction, and the Gross Production and Proration Tax Statutes have no application to the lease or the oil and gas produced from the land herein involved, for the reason that the same is under the exclusive jurisdiction of the United States.

Wherefore, Protestant respectfully requests that it be granted a hearing before the Oklahoma Tax Commission, for the presentation of evidence and argument in support of this protest, and prays that the claim herein asserted be dismissed.

[fol. 120] STATE OF OKLAHOMA, County of Oklahoma, ss:

Robert W. Richards, of awful age, being first duly sworn, upon oath states, that he is the attorney for the Protestant, Magnolia Petroleum Company, in the foregoing protest; that he is duly authorized by the Protestant to verify this protest on its behalf; that he has read the foregoing protest and that the statements and allegations therein made are true and correct, as he verily believes.

Receipt of the foregoing protest is acknowledged this 1st day of July, 1944.

(S.) A. L. Herr, Attorney for the Oklahoma Tax Commission.

RWR:I:6-30-44.

EXHIBIT "A",

J. Frank Martin, Chairman; J. D. Dunn, Vice-Chairman; R. H. Sibley, Member; H. D. Canfield, Secretary.

Gross Production Division

Oklahoma Tax Commission, State of Oklahoma, Oklahoma City

June 5th, 1944.

REGISTERED

Magnolia Petroleum Company, Magnolia Building, Dallas, Texas.

GENTLEMEN:

You are hereby notified that the Oklahoma Tax Commission in accordance with the provisions of Section 22, Article 2, Chapter 66 of the Oklahoma Session Laws of 1939 proposes to assess gross production tax and penalty and proration tax and penalty upon you and upon your ¼ interest in the Kla-da-ing lease, for the period June 1, 1942, to March 31, 1944, both inclusive, as particularly set out in a detailed Tax Statement hereto attached and made a parthereof, in amounts, upon your ¼ interest in the lease as therein set out, to-wit:

(Continued)

Remittance should be made payable to the Oklahoma Tax Commission and refer to Division.

[fol. 122]

			Gros	8 Froqu	ction.	Lax	
Lease Name and Description	1		Tax.	Penalt	y to,	Tot	al Tax Penalty
1/4 interest in the Kla-da-ing lease N NWSW 3-5-9,							·
Caddo County, Oklahoma	r + 12 3		\$41.97	e	87.28		\$49.25
TOTALS			\$41.97		87.28	-	\$49.25
		-otro owis				00-	

(Continued) .

T3		FFT
Prorat	non	Lax

Lease Name and Description		Tax			Penalty to Cotal Tax 6-1-1944 and Penalty			
1/4 interest in the Kla-da-ing lease N NWSW 3-5-9, Caddo County, Oklahoma		1	0	\$.81	./:	\$ 12.		\$ 93
TOTALS	o • ·			\$.81	/	\$.12		\$.93
4.		P	·5" ·	-			and the second of	-

(Continued)

[fol. 124]—Section 22, Article 2, Chapter 66, Session Laws of 1939, further provides that within thirty (30) days after the mailing of the notice provided for the taxpayer may file with the Tax Commission a written protest under oath, signed by himself or his duly authorized agent, setting out the information required in Paragraph 3 of that Section and this Section further provides:

"If in such written protest the taxpayer shall request an oral hearing, the Tax Commission shall grant such hearing, and shall, by written notice advise the taxpayer of a date, which shall not be less than ten (10) days from the date of mailing of such written notice, when such taxpayer may appear before the Tax Commission and present arguments and evidence, oral or written, in support of its protest.

If any taxpayer fails to file such written protest within the period of thirty (30) days, as provided by this Section, then the Tax Commission shall immediately proceed to assess the tax and no appeal to the Supreme Court from the Order of the Tax Commission assessing such tax shall be allowed under Section 26 of this Act; provided, the Tax Commission shall, for good cause shown, have authority to extend the period of thirty (30) days within which any taxpayer must file a protest."

You are notified that the Oklahoma Tax Commission proposes to assess the amount of tax and penalties designated above. Provision is included for your rights and privileges.

Yours very truly, Oklahoma Tax Commission, by J. Frank Martin, Chairman.

LLL: ws; mj. Incl.

Ехнівіт "В"

BEFORE THE OKLAHOMA TAX COMMISSION ..

Case No. 1750

In the Matter of the Protest of the Magnolia Petroleum Company, a Corporation, Against Assessment of Gross Production and Proration Taxes on Production from Wild-Tribes Indian Leases

PROTEST

Comes now the Magnolia Petroleum Company, a corporation, and, in response to the demand of the Oklahoma Tax. Commission made under date of June 5, 1944, for the payment of gross production tax and penalty, and proration tax and penalty on the lessee's share of oil and gas produced during the period from June 1, 1942, to March 31, 1944, both inclusive, from the following tract of land, known as a Wild Indian Tribes Indian Lease and situated in Caddo County, State of Oklahoma, and more particularly described as:

"14th Interest in the Kla-da-ing Lease, N/2 NW/4 SW/4 of Section 3-5N-9W, in Caddo County, Oklahoma,

respectfully shows to the Tax Commission:

[fol. 126]

That the claim asserted by the Tax Commission in the total sum of \$50.18 is without merit in that the lease herein involved is a lease on the land of a restricted Indian, and the lease and lessees thereof are Federal instrumentalities and not subject to the Gross Production Tax or Proration-Tax Laws of the State of Oklahoma; and in that connection the Protestant alleges that the Congress of the United States has Never consented to the imposition of a gross production or proration tax by the State of Oklahoma upon the production from such leases, and by reason thereof, the State is without authority to levy such a tax thereon:

The Protestant further states that the proposed assessment would violate the provisions of the Federal and State. Constitutions and the Enabling Act under which the State

of Oklahoma was admitted to the Union.

That the Protestant has heretofore, during the period from June 1, 1942, to March 31, 1944, filed, from time to time and in all respects in the manner provided by law, its reports with the Oklahoma Tax Commission, in all of which reports all of the production from the above-named lease, [fol. 127] during the period of time involved herein, was set forth and specifically claimed as being exempt from the Gross Production and Proration Tax Laws of the State of Oklahoma.

III

That under certain well-known decisions of the Supreme Court of the United States and the Supreme Court of the State of Oklahoma, the State laws relating to the gross Production and proration taxes have no application whatsoever to the leases on lands of restricted members of the so-called Wild Tribes of Indians, or to oil or gas produced therefrom. That the Protestant has heretofore in the utmost good faith, acting upon the above mentioned controlling decisions as being the law of the land, and by reason thereof, paid ad valorem taxes in lieu of gross production taxes. That those decisions have long been regarded by the administrative, legal, and executive officers of the State as being in all respects binding upon the State and County authorities; and the Protestant states that those decisions have not to this date been modified, reversed or overruled.

[fol. 128]

The Protestant further states that in addition to the above-mentioned controlling decisions, the Legislature of the State of Oklahoma, in the laws enacted in the year 1925, Chapter 20, Section 3 (68 O. S. A., Sec. 832) took cognizance of the exempt character of the oil and gas produced from the lands here involved, in the following legislative enactment, namely;

"In all cases of overpayment, duplicate payment or payment made in error on account of the production being derived from restricted Indian lands and therefore exempt from taxation, the State Auditor, by and with the approval of the State Board of Equalization, after an Audit by the State Examiner and Inspector, is authorized to refund my such overpaid, duplicate or erroneously paid gross production taxes out of any gross production tax funds in his hands from the same county from which the original tax was derived and not apportioned to the State Treasurer to be distributed as provided by law,"

and that the attempt here made by the Tax Commission to collect gross production and proration taxes on oil and gas produced from the lease on the land herein involved [fol. 129] violates the provisions of the above-named statute and the provisions of the State and Federal authorities.

V

That the State of Oklahoma is without jurisdiction, and the Gross Production and Proration Tax Statutes have no application to the lease or the oil and gas produced from the land herein involved, for the reason that the same is under the exclusive jurisdiction of the United States,

Wherefore, protestant respectfully requests that it be granted a hearing before the Oklahoma Tax Commission, for the presentation of evidence and argument in support of this protest, and prays that the claim herein asserted be dismissed.

Magnolia Petroleum Company, By — , Its Attorney.

[fol. 130] STATE OF OKLAHOMA, Oklahoma County, ss:

Robert W. Richards, of lawful age, being first duly sworn, upon eath states, that he is the attorney for the Protestant, Magnolia Petroleum Company, in the foregoing protest; that he is duly authorized by the Protesant to verify this protest on its behalf; that he has read the foregoing protest and that the statements and allegations therein made are true and correct, as he verily believes.

Receipt of the foregoing protest is acknowledged this 1st day of July, 1944..

(S.) A. L. Herr, Attorney for the Oklahoma Tax Commission.

RWR-I: 6-30-44.

[fol. 131]

Ехнівіт "С"

3630 Patent

The United States of America, to the Heirs of Mary Molino, 1777598. 32382-39: I. O. 943 & 942.

Filed for record Oct. 19, 1939 at 9:30 A.M:

(Recorded in Book 88 of Deeds, Page 191) Eddie Cole County Clerk (Seal)

The United States of America, to all to Whom These Presents shall come, Greeting:

Whereas, an Order of the Secretary of the Interior has been deposited in the General Land Office, directing that a fee simple patent issue to the claimants, the heirs of Mary. Moleno, devisee of Moleno, heir of Wau-co-chah and Kla-daing (Black Apache) Apache Indians, for an undivided onefourth interest in and to the east half of the northeast quarter of Section eight, the west half of the Northwest quarter of Section nine, the west half of the southwest. quarter of Section three, and the north half of the northwest quarter of Section ten in Township five north of Range nine west of the Indian Meridian, Oklahoma, excepting from the effect of this conveyance however, that certain parcel of ground containing twelve acres and nineteen. hundredths of an acre, in the west half of the southwest quarter of said Section three, heretofore conveyed to the St. Louis-San Francisco Railway Company, by deed approved March 3, 1930, and recorded in Indian Office Deed Book, Volume 58 at page 63 and also, that certain parcel of ground containing eight acres and thirteen hundredths of an acre in the northwest quarter of the southwest quarter. of said section three, heretofore conveyed to the Magnolia Petroleum Company with mineral rights reserved, by deed [fol. 132] approved July 31, 1930, and recorded in the Indian Office Deed Book, Volume 59 at page 85 in the Office of the Commissioner of Indian Affairs, containing after

making the exceptions above specified, two hundred ninetynine acres and sixty-eight hundredths of an acre:

Now Know Ye, That the United States of America, in consideration of the premises, has given and Granted and by these presents does give, and grant, unto the said claimants and to the heirs of the said claimants, an undivided one-fourth interest in the Land above described; to Have and to Hold the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimants and to the heirs and assigns of the said claimants forever.

In Testimony Whereof, I, Franklin D. Roesevelt, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land

Office to be hereunto affixed. .

Given under my hand at the City of Washington, the Twenty-fifth day of September, in the year of our Lord one thousand nine hundred and thirty-nine and of the Independence of the United States the One hundred and sixty-fourth.

By the President. Franklin D. Roosevelt, by Jeanne Kavanagh, Secretary. R. S. Clinton, Acting Recorder of the General Land Office.

(Seal) Recorded: Patent Number 1105385.

[fol. 133]

Ехнівіт "А"

Oklahoma Tax Commission

State of Oklahoma, Oklahoma City, June 5th, 1944.

J. Frank Martin, Chairman, J. D. Dunn, Vice Chairman, R. H. Sibley, Member, H. D. Canfield, Secretary.

Gross Production Division

Registered

Magnolia Petroleum Company Magnolia Building Dallas, Texas.

GENTLEMEN:

You are hereby notified that the Oklahoma Tax Commission, in accordance with the provisions of Section 22, Article 2, Chapter 66, of the Oklahoma Session Laws of 1939, proposes to assess gross production tax and penalty and prora-

tion tax and penalty upon you and upon your ½ interest in the Pau Kune lease for the period June 1st, 1942 to March 31, 1944, both inclusive, as particularly set out in detailed tax statements hereto attached and made a part hereof in amounts upon your ⅓ interest in the lease as therein set out, to-wit:

Remittances should be made payable to the Oklahoma Tax Commission and refer to Division.

[fol. 134]

Lease Name and
Description

1/3 interest in the Pau Kune lease
N/2 NE/4 Section 10-5-9,
Caddo County, Oklahoma

TOTALS

[fol. 135]

Lease Name and
Description

1/3 interest in the Pau Kune lease
N NE Sec. 10-5-9, &
Caddo County, Oklahoma

TOTALS

	ss Production T Penalty to	Total	
Tax	6-1-1944	and Pe	nalty
5,085.24	\$1,003,06	\$6,0	088.30
5 .085 .24	\$1,003.06	\$6;0	088.30

•	Prore	tion Tex			,
Tax	• Per 6-	nalty to 1-1944	To and	tal Ta Penal	ty
\$105.74		\$21:70		\$127	44
\$105.74		\$21.70		\$127	44

[fol. 136] Section 22, Article 2, Chapter 66, Session Laws of 1939, further provides that within thirty (30) days after the mailing of the notice provided for, the taxpayer may file with the Tax Commission a written protest under oath, signed by himself or his duly authorized agent, setting out the information required in Paragraph 3 of that Section and this Section further provides:

"If in such written protest the taxpayer shall request an oral hearing, the Tax Commission shall grant such hearing, and shall, by written notice advise the taxpayer of a date, which shall not be less than ten (10) days from the date of mailing of such written notice, when such taxpayer may appear before the Tax Commission and present arguments and evidence, oral or written, in support of its protest.

If any taxpayer fails to file such written protest within the period of thirty (30) days, as provided by this

Section, then the Tax Commission shall immediately proceed to assess the tax and no appeal to the Suprome Court from the Order of the Tax Commission assessing such tax shall be allowed under Section 26 of this Act; provided, the Tax Commission shall, for good cause shown, have authority to extend the period of thirty (30) days within which any taxpayer must file a protest."

You are notified that the Oklahoma Tax Commission proposes to assess the amount of tax and penalties designated above. Provision is included for your rights and privileges.

Yours very truly, Oklahoma Tax Commission, by J. Frank Martin, Chairman.

LLL: ws,mj, Incl.

[fol. 137]

Ехнівіт "В"

Before the Oklahoma Tax Commission

Case No. 1751

In the Matter of the Protest of Magnolia Perroleum Company, a Corporation, Against Assessment of Gross Production and Proration Taxes on Production from Wild Tribes Indian Leases

PROTEST

Comes now the Magnolia Petroleum Company, a corporation, and, in response to the demand of the Oklahoma Tax Commission made under date of June 5, 1944, for the payment of gross production tax and penalty, and proration tax and penalty on the dessee's share of oil and gas produced during the period from June 1, 1942, to March 31, 1944, both inclusive, from the following tract of land, known as a Wild Tribes Indian Lease and situated in Caddo County, State of Oklahoma, and more particularly described as: 1/3 interest in the Pau Kune Lease, N/2 NE/4 of Section 105N-9W, in Caddo County, Oklahoma, respectfully shows to the Tax Commission:

T

That the claim asserted by the Tax Commission in the Total sum of \$6,215.74 is without merit in that the lease herein involved is a lease on the land of a restricted Indian, and the lease and lessees thereof are Federal instrumentali-[fol. 138] ties and not subject to the Gross Production Tax or Proration Tax Laws of the State of Oklahoma; and in that connection the Protestant alleges that the Congress of the United States has never consented to the imposition of a gross production or proration tax by the State of Oklahoma upon the production from such leases, and by reason thereof, the State is without authority to levy such a tax thereon.

The Protestant further states that the proposed assessment would violate the provisions of the Federal and State Constitution and the Enabling Act under which the State of Oklahoma was admitted to the Union.

TI

That the Protestant has hrertofore, during the period from June 1, 1942, to March 31, 1944, filed, from time to time and in all respects in the manner provided by law, its reports with the Oklahoma Tax Commission, in all of which reports all of the production from the above-named lease, during the period of time involved herein, was set forth and specifically claimed as being exempt from the Gross Production and Proration Tax Laws of the State of Oklahoma.

[fol. 139]

·III

That under certain well-known decisions of the Supreme Court of the United States and the Supreme Court of the State of Oklahoma, the State laws relating to the gross production and proration taxes have no application whatsoever to the leases on lands of restricted members of the so-called Wild Tribes of Indians, or to oil or gas produced therefrom. That the protestant has heretofore in the utmost good faith, acting upon the above-mentioned controlling decisions as being the law of the land, and by reason thereof, paid ad valorem taxes in lieu of gross production taxes. That those decisions have long been regarded by the

administrative, legal, and executive officers of the State as being in all respects binding upon the State and County authorities; and the Protestant states that those decisions have not to this date been modified, reversed or overruled.

IV

The Protestant further states that in addition to the above mentioned controlling decisions, the Legislature of the State of Oklahoma, in the laws enacted in the year 1925, Chapter 20, Section 3 (68 O. S. A., Sec. 832) took cognizance of the exempt character of the oil and gas produced from the lands here involved, in the following legislative enactment, anamely:

[fol. 140] "In all cases of overpayment, duplicate payment or payment made in error on account of the production being derived from restricted Indian lands and therefore exempt from taxation, the State Auditor, by and with the approval of the State Board of Equalization, after an audit by the State Examiner and Inspector, is authorized to refund any such overpaid, duplicate or erroneously paid gross production taxes out of any gross production tax funds in his hands from the same county from which the original tax was derived and not apportioned to the State Treasurer to be distributed as provided by law."

and that the attempt here made by the Tax Commission to collect gross production and proration taxes on oil and gas produced from the lease on the land herein involved violates the provisions of the above-named statute and the provisions of the State and Federal authorities.

\mathbf{V}

That the State of Oklahoma is without jurisdiction, and the Gross Production and Proration Tax Statutes have no application to the lease or the oil and gas produced from the land herein involved, for the reason that the same is under the exclusive jurisdiction of the United States.

[fol. 141] Wherefore, Protestant respectfully requests that it be granted a hearing before the Oklahoma Tax Commission, for the presentation of evidence and argument in

The United States of America,

To all to whom these Presents shall come, GREETING:

Shoreas, There has been deposited in the Seneral Dand Ofice of the United Plates a schedule of allotments of land, dated Olys. 15.1891.

Indian Affairs, approved by the Secretary of the Interior Olys. 16.1891.

whereby it appears that, under the provisions of the Stot of Congress approved Fibruary 8, 1887, (24 Day) 888.) All anieuded by the Clerk of Congress approved Fibruary 8, 1887, (24 Day) 888.) All anieuded by the Oles of Congress approved Fibruary 8, 1887, (24 Day) 888.) All anieuded by the Oles of Congress approved Fibruary 8, 1887, (24 Day) 888.) All anieuded by the Oles of March 1911, 26 e late 1019, on Minima of the Oles of March 1911, 26 e late 1019, on Indian of the Oles of the March 1911, 26 e late 1019, on Indian Oles of the New Secretarian Congress of the New Secretarian C

Bow, Buow Je, That the Venited Actes of America, in consideration of the premises and in accordance with the provisions of the fifth section of said Act of Congress of the 5th February, 1887, HEREBY DECLARES that it does and will hold the land thus allotted (subject to all the restrictions and canditions contained in said fifth section) for the fireway of twenty-five years, in trust for the sole use and benefit of the said Mile-felic or Said K. Milles or or, en, case of his decease, for the sole use of his heirs, according to the laws of the Acte or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian,

bonight of the said Mur- pur or Frank "Luvie

sole use of his heirs, according to the laws of the Rate or Territory where such land is located, and that at the expiration of said period the United Rates will convey the same hy patent to said Indian, on his hoirs, as apresaid, in fee, discharged of said trust and free of all charge or sugarmhrance what soever: Browless, That the President of the Houted Rates may, in his descretion extend the said period.

In Zestimony Whercof, I, Designer Noncison . President of the United Rates of America, have caused these letters to be made Fatent, and the seal of the General Land Office to be hereunto affixed.

Green under my hand, at the City of Mushington, the a Mentitute day of Standard, in the year of our Lond one thousand eight hundred and Minity Fred, and of the Independence of the United Aries the one hundred and It the Independence of the United Aries the one hundred and It thereto.

By the President: Chyfameri. Harrie or A.

By C. Marfarland. act of Secretary.

D. Roberte

Recovery of the General Land Office.

11 100

in this office.

I-94-Ind - 758

EXHIBIT "C-2"

Lease No . 10480

Form 5 154 h

OIL AND GAS MINING LEASE LALLOTTED INDIAN LANDS.

Shawnos Indian

Reservation Marraso Oklas

This indenture or lease, made and entered into in quadruplicate on this 13th day of March

by and between Frank Davis or Mio- puo b-1565 and his wife Alice Davis

of Asher R # 2

State of Oklahoma

allottee No 809 Oi the Oit. Pottamatomie tribe of Indians, party of the first part, hereinafter designated as

W. C. Progtor, Trustees for Magholia Petroleum Company

of white vertices, state of Texas , party of the second part, hereinafter called the lessee , under and in pursuance of the provisions of the act of Congress approved March 3, 1909 (35 Stat. L.: 781-783), and the regulations approved by the Secretary of the Interior, September 3, 1912;

WITNESSETH:

1. The lessor , for and in consideration of one dollar, the receipt whereof is acknowledged, and of the royalties, covenants, stipulations, and conditions hereinafter contained, and hereby agreed to be paid; observed, and performed by the lessee , do hereby demise, grant, lesse, and let unto the lessee for the term of ten years from the date of the approval hereof by the Secretary of the Interior, and as much longer thereafter as oil and gas shall be found in paying quantities, all the oil deposits and natural gas in or under the

following-described tract of land, lying and being within the county of Postana son 10

Oklah ma

The H/2 of the HE

2894

4 ---

15

AU VE DE

and as much longer thereafter as oil and gas shall be found in paying quantities, all the oil deposits and natural gas in or under the following-described tract of land, lying and being within the county of State of Oklub ma. to wit: The #/2 of the #Bc 28945

of section township 7 North range of the Moridian, and containing 80 acres, more or less, with the exclusive right to prospect for, extract, pipe, store, and remove oil and

and containing _______ acres, more or less, with the exclusive right to prospect for, extract, pipe, store, and remove oil and natural gas, and to occupy and use so much only of the surface of said land as may reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing, and removing such oil and natural gas, also the right to obtain from wells or other sources on said land, by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, and also the right to use, free of cost, oil and natural gas as fuel so far as necessary to the development and operation of said property.

2. The lessee hereby agrees to pay or cause to be paid to the Superintendent of Indian School or other officer of the United States having jurisdiction over the lessed premises, hereinafter called the officer in charge, for the use and benefit of the lessor , as royalty,

the sum of _______ per cent of the gross proceeds of all crude oil extracted from the said land, such payment to be made at the time of sale or removal of the oil. And the lessee—shall pay as royalty on each gas-producing well three hundred dollars per annum in advance, to be calculated from the date of commencement of utilization: Provided, That in the case of gas wells of small volume, when the rock pressure is one hundred pounds or less, the parties hereto may, subject to the approval of the Secretary of the Interior, agree upon a royalty which will become effective as a part of this lease: Provided further, That in case of gas wells of small volume or where the wells produce both oil and gas or oil and gas and salt water to such an extent that the gas is unfit for ordinary domestic purposes, or where the gas from any well is desired for temporary use in connection with drilling and pumping operations on adjacent or nearby tracts, the leasee—shall have the option of paying royalties upon such gas wells of the same percentage of the gross proceeds from the sale of gas from such wells as is paid under this lease for royalty on oil. The lessor—shall have the free use of gas for domestic purposes in

residence on the leased premises, provided there be surplus gas produced on said premises over and above enough to fully operate the same. Failure on the part of the lease to use a gas-producing well which can not profitably be utilized at the rate herein prescribed, shall not work a forfeiture of this lease so far as the same relates to mining oil, but if the lease desire to retain gas-producing privileges, the lease shall pay a rental of one hundred dollars per annum, in advance, calculated from date of discovery of gas, on each gas-producing well the gas from which is not marketed or not utilized otherwise than for operations under this lease. Payments of annual gas royalties shall be made within twenty-five days from the date such royalties become due, other royalty payments to be made monthly on or before the 25th day of the month succeeding that for which such payment is to be made, supported by sworn statements.

3. Until a producing well is completed on said premises the lessee shall pay, or cause to be paid, to the officer in charge, for the use and benefit of the lessor, as advanced royalty, from the date of the approval of this lease, fifteen cents per acre per annum, in advance, for the first and second years; thirty cents per acre per annum, in advance, for the third and fourth years; seventy-five cents per acre in advance, for the fifth year; and one dollar per acre per annum, in advance, for each succeeding year of the term of this lease; it being understood and agreed that such sums of money so paid shall be a credit on stipulated royalties for the year for which the payment of advanced royalty is made, and the lessee hereby agree that said advance royalty when paid shall not be refunded to

- 4. The lessee shall exercise diligence in sinking wells for oil and natural gas on the land covered by this lease, and shall drill at least one well thereon within one year from the date of approval of this lease by the Secretary of the Interior, or shall pay to the officer in charge, for the use and benefit of the lessor, for each whole year the completion of such well is delayed, after the date of such approval by the Secretary of the Interior, for not to exceed ten years from the date of such approval, in addition to the other considerations named herein, a rental of one dollar per acre, payable annually; and if the lessee shall fail to drill at least one well within any such yearly period and shall fail to surrender this lease by executing and recording a proper release thereof and otherwise complying with paragraph numbered 7 hereof on or before the end of any such year during which the completion of such well is delayed, such failure shall be taken and held as conclusively evidencing the election and covenant of the lessee to pay the rental of one dollar per acre for such year, and thereupon the lessee shall be absolutely obligated to pay such rental. The failure of the lessee to pay such rental before the expiration of fifteen days after it becomes due at the end of any yearly period during which a well has not been completed as provided herein, shall be a violation of one of the material and substantial terms and conditions of this lease, and be cause for cancellation of such lease under paragraph numbered 9 hereof; but such cancellation shall not in anywise operate to release or relieve the lessee from the covenant and obligation to pay such rental, or any other accrued obligation. The lessee may be required by the Secretary of the Interior, or by such officer as may be designated by him for the purpose, to drill and operate wells to offset wells on adjoining tracts, and within three hundred feet of the dividing line, or in case of gas wells, lessee may have the option, in lieu of drilling offset wells, of paying a sum equal to the royalties which would accrue on each well to be offset if said wells had been drilled and were being operated on the land described herein and in accordance with the terms hereof. It is understood and agreed by the parties hereto that offset wells shall be drilled, or royalty paid in lieu of drilling, within ten days after the lessee is notified to do so, and failure to comply with such requirement shall constitute a violation of one of the substantial terms of this lease.
 - 5. The lessee shall carry on development and operations in a workmanlike manner, commit no waste on the said land and suffer

none to be committed upon the portion in the last cocupancy or use, take good care of the same and promptly surrender and return the premises upon the termination of this lease to the lessor or to whomsoever shall be lawfully entitled thereto, unavoidable casualties excepted; the lessee shall not remove therefrom any buildings or permanent improvements erected thereon during the said term by the said lessee, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease, excepting the tools, derricks, boilers, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines, and machinery, and the casing of all dry or exhausted wells, which shall remain the property of the lessee and may be removed at any time prior to sixty days after the termination of the lease by forfeiture or otherwise; shall not permit any nuisance to be maintained on the premises under lessee control, nor allow any intoxicating liquors to be sold or given away for any purposes on such premises; shall not use such premises for any other purpose than those authorized in the lease; and before abandoning any well shall sectionly plug the same so as effectually to shut off all water from the oil-bearing stratum, on in the manner required by

parties hereto that offset wells shall be druled, or royally paid in new or diffiling, within ten days liner the resee is notified to do so, and failure to comply with such requirement shall constitute a violation of one of the substantial terms of this lease.

5. The lessee shall carry on development and operations in a workmanlike manner, commit no waste on the said land and suffer

none to be committed upon the portion in occupancy or use, take good care of the same and promptly surrender and return the premises upon the termination of this lease to the lessor or to whomsoever shall be lawfully entitled thereto, unavoidable casualties excepted; the lessee shall not remove therefrom any buildings or permanent improvements erected thereon during the said term by the said lessee, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lesse, excepting the tools, derricks, boilers, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines, and machinery, and the casing of all dry or exhausted wells, which shall remain the property of the lessee and may be removed at any time prior to sixty days after the termination of the lease by forfeiture or otherwise; shall not permit any nuisance to be maintained on the premises under lessee control, nor allow any intoxicating liquors to be sold or given away for any purposes on such premises; shall not use such premises for any other purpose than those authorized in the lease, and before abandoning any well shall sectionly plug the same so as effectually to shut-off all water from the oil-bearing stratum, or in the manner required by the laws of the State in which the lands are situated.

6. The lessee shall keep an accurate account of all oil-mining operations, showing the sales, prices, dates, purchasers, and the whole amount of oil mined or removed; and all sums due as royalty shall be a lien on all improvements, tools, movable machinery, and all other personal chattels used in operating said property, and upon all of the unsold oil obtained from the land herein leased, as security for payment of said soyalty.

The lessee shall submit quarterly reports, whether oil royalty is paid by the pipe line company or other purchaser, to the officer in charge within fifteen days after March 31, June 30, September 30, and December 31 of each year upon prescribed forms, showing manner of operation, total production during the quarter, and all receipts during the quarter from any operations under the lesse for the benefit of the lesser or the lessee, or both, giving the amount of each payment, the name of the party making same, and the nature of the operations from which the money covered by such payment was derived.

7. The lessee may at any time, by paying to the officer in charge all amounts then due as provided herein, and the further sum of one dollar, surrender and cancel this lesse and be relieved from all further obligations or liability thereunder: Provided, That if this lesse has been recorded, lessee shall execute a relesse and record the same in the proper county recording office: Provided further, That in the event the trust per od expires or the lessor begranted a patent in fee, the lessee may surrender all the undeveloped portion of the lessed premises, by paying the officer in charge all amounts then due and the further sum of one dollar, which surrender shall not affect; the terms hereof as to each producing well and ten acres of said premises as nearly in square form as possible next contiguous to and surrounding each of said wells, and execute and record a cancellation of premises surrendered.

8. This lease shall be subject to the regulations prescribed by the Secretary of the Interior, now or hereafter in force, relative to such leases, all of which regulations are made a part and condition of this lease: Provided, That no regulations made after the approval of this lease, affecting either the length of term of oil and gas leases, the rates of royalty or payment thereunder, or the assignment of leases, shall operate to affect the terms and conditions of this lease.

9. Upon the violation of any of the substantial terms and conditions of this lease, the Secretary of the Interior (or the lessor, in event restrictions are removed as provided in paragraph 12 hereof) shall have the right at any time after thirty days notice to the lessee

0- 104

support of this protest, and prays that the claim herein asserted be dismissed.

Magnolia Petroleum Company, by ————, Its Attorney.

STATE OF OKLAHOMA, Oklahoma County, ss:

Robert W. Richards, of lawful age, being first duly sworn, upon oath states, that he is the attorney for the Protestant, Magnolia Petroleum Company, in the foregoing protest; that he is duly authorized by the Protestant to verify this protest on its behalf; that he has read the foregoing protest and that the statements and allegations therein made are true and correct, as he verily believes.

Subscribed and sworn to before me this 1st day of July, 1944. ———, Notary Public. My Commission Expires ———,——.

Receipt of the foregoing protest is acknowledged this 1st day of July, 1944. (S.) A. L. Herr, Attorney for the Cklahoma Tax Commission.

RWR-I:6-30-44.



Copy below is attached to Page 74.

THE STATE OF TEXAS. COUNTY OF DALLAS.

03990

BEFORE ME, a Notary Public in and for said State and County, on this 30k day of March . 1923, personally appeared E. R. BROWN, to me known to be the identical person who subscribed the name of the maker thereof to the foregoing instrument as Vice-President of MAGNOLIA PETROLEUM COMPANY, a joint stock association, and acknowledged to me that he executed the same as his free and voluntary act and deed and as the free and voluntary act and deed of such association, for the uses and purposes therein set forth.

IN WITHESS WHEREOF, I have hereunto set my hand and affixed my Motorial Seal, the day and year last above written.

My Commission Expires: 1et, 19_23_.

specifying the terms of conditions violated, to declare this lease null and void, and the lassor shall then be entitled and authorized in take immediate possession of the land.

10 Before this lease shall be in force and effect the lessee shall furnish a bond with responsible surety to the satisfaction of the Swiretary of the Interior gonditioned for the performance of this lease, which bond shall be deposited and remain on file in the Indian Office.

11. Assignment of this lease or any interest therein may be made with the approval of the Secretary of the Interior, it being understood that to secure such approval the proposed assignee need only be qualified to hold such a lease under the rules and regulations, and furnish a bond with responsible surety to the satisfaction of the Secretary of the Interior, and such further bond or bonds as may be required by said Secretary, conditioned for the faithful performance of the covenants and conditions of this lease.

12. In event restrictions on alienation shall be removed from all the leasehold premises described above, by the trust period expiring and the lessor being given a patent in fee to the lands, or by the lessor being granted a patent in fee prior to the termination of his trust patent, this lease shall be released from the supervision of the Secretary of the Interior, such release to take effect without further agreement, from the date such restrictions are removed, and thereupon the authority and power delegated to the Secretary of the Interior as herein provided shall cease, and all payments required to be made to the officer in charge shall thereafter be made to lessor or the then owner of said lands in person, or be deposited to the credit of said lessor or his assigns at such place as the said lessor or his awagns may from time to time designate in writing, and changes in regulations thereafter made by the Secretary of the Interior applicable to oil and gas leases shall not apply to this lease.

13. Each and every clause and covenant in this indenture shall extend to the heirs, executors, administrators, successors, and

lawful assigns of the parties hereto.

14. In witness whereof, the said parties have hereunto subscribed their names and affixed their seals on the day and year first

above mentioned. Two witnesses to execution by lessor. ACHOLIA PETROLEUM COMPANY, Two witnesses to execution by lessee MAGNOLIA PETROLEUM COMPANY

Shawaes Oklah ma

Two witnesses to execution by lessee

Vice-President

ssistant Secretary.

DEPARTMENT OF THE INTERIOR WASHINGTON, D. C. JUN - 5 1940

(Sgd.) J. M. STEWART For the Commissioner

	before me, A Rotary Public	
	a and for said county and State, on this	
	Prest Beets alter Davis bie vife	
	o me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that	
	xecuted the same as ghats free and voluntary act and deed for the uses and purposes therein set forth.	
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•	Baspectfully submitted to the Secretary of the Interior, with recommendation of it by APPROVED	*
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	Assistant Commissioner of Indian Affair	
	DEPARTMENT OF THE INTERIOR, APR 131923	
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6528

United States of America



THE NATIONAL ARCHIVES

all to whom these presents shall come, Greeting:

3 Certify That the annexed copy, or each of the specified number of ed copies, of each document listed below is a true copy of a document official custody of the Archivist of the United States.

tub of Pottawatomie Land Certificate No. 120-Act of May 23, 1872.

tub of Pottawatomie Land Certificate No. 120-Act of May 23, 1872.
his document is from the records of the Office of Indian Affairs.

estimony whereaf. I, SOLON J. BUCK. Archivist of the United States.

have hereunto caused the Seal of the National Archives to be affixed and my name subscribed by the Chief or Acting Chief of the General Reference Division of the National Archives, in the District of Columbia, this 2d day

of <u>Varch</u> 1945.

Solon J. Buck

Archivist of the United States

By W. Heil Frankline

"EXHIBIT E-1"

(7-1-2)

147

POTTAWATOMIE LAND CERTIFICATES.

ACT OF CONGRESS, MAY 23, 1872.

No. 121 -

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DESCRIPTION OF LAND:

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DATE OF ISSUE!

Sept. 3

1891

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DATE OF DELIVERY:

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This is to certify That

of the "citizen land" of Port AWATOMIE Indians, residing upon the "therty-mile-square tract" Reservation in Indian Territory, having signified a desin to livete permanently upon said reservation, and cultivate the seil as a means of subsistence, and to receive an alletiment of land for that project our provided by an act of Congress approved May 23, 1872 and having resided on sain reservation continuently for this years, is intelled to acres of land within said reservation, to

benform to the legal sutdiresions of government surveys, and has scholed for such purpose the following-described factor, vig

East of the Indian Meridian in Indian Territory, containing an aggregate of

This Gertificate is not assignable, and the said

is expressly prohibited from assigning or attempting to assign the same, and from selling or transferring the said land, or disposing of the same of any interest therein, except to the United States, or to persons of Indian fleed, residing within the Indian Territory, with permission of the President, and under such regulations as the Secretary of the Interior shall prescrite, under penalty of an entire forfeiture thereof And it is further certified that the tructs of land, as alive described, are set apart for the exclusive and perpetual use and benefit of said alletter and he hers, and, until otherwise provided by law, the same shall be exempt from levy, taxation, or sale

, Commissioner.

Ехнівіт "L"

Code of Federal Regulations
Title 30—Mineral Resources
Chapter II
Geological Survey
Part 221

Oil and Gas Operating Regulations

[fol. 151] Applicable to Lands of the United States and all Restricted Tribal and Allotted
Indian Lands
(Except Osage Indian Reservation)

7 F. R. 4132 - 4141

United States Department of the Interior Harold L. Ickes, Secretary
Geological Survey
W. C. Mendenhall, Director

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Department of the Interior
Part 221—Oil and Gas Operating Regulations

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Part 221-Oil and Gas Operating Regulations

Section 221.1 Introduction. These oil and gas operating regulations will govern the development and production of deposits of oil, gas, and casing-head or natural gasoline, including propane, butane, and other hydrocarbons, and fluids, and lands containing such deposits owned or controlled by the United States, and under jurisdiction of the Secretary by law or administrative arrangement. These regulations shall be administered under the Director of the Geological Survey, except that as to lands within naval petroleum reserves they shall be administered under such official as the Secretary of the Navy shall designate.

221.2 Definitions. The following terms as used in these oil and gas operating regulations shall have the meanings here given:

- (a) Secretary.—The Secretary of the Interior, except where lands in naval petroleum reserves are involved, and in that case the Secretary of the Navy.
- (b) Director.—The Director of the Geological Survey, Washington, D. C., having administrative direction of the enforcement of these regulations.
- (c) Supervisor.—A representative of the Secretary, under administrative direction of the Director, author-

Public Lands: Sec. 32, 41 Stat. 450, sec. 7, 42 Stat. 1450, sec. 6, 46 Stat. 374, 46 Stat. 1523, 47 Stat. 798, sec. 40(a), 48 Stat. 977, 49 Stat. 674, 50 Stat. 842; 30 U. S. C., 189, 236, 306, 184, 226, 209, 229a, 30 U. S. C., Sup., 185, 221, 223, 223a, 226, 236a, 221i.

Naval Petroleum Reserves: 41 Stat. 813, 45 Stat. 148, 52 Stat. 1252; 34 U. S. C., Sup., 524.

Indian Lands: Sec. 3, 26 Stat. 795, sec. 2, 35 Stat. 312, 35 Stat. 783, sec. 2, 39 Stat. 519, sec. 18, 41 Stat. 426, sec. 6, 41 Stat. 753, 42 Stat. 857, 43 Stat. 111, 43 Stat. 244, 44 Stat. 300, sec. 6, 44 Stat. 659, 46 Stat. 385, 52 Stat. 347, 25 U. S. C., 397, 396, 356, 400, 401, 398, 400a, 25 U. S. C., Sup., 396a, b, c, d, e, f.,

^{*} Sections 221.1 to 221.67, inclusive, issued under authority contained in the following statutes:

ized and empowered to supervise and direct oil and gas operations and to perform other duties prescribed in these oil and gas operating regulations, or any subordinate of such representative acting under his direction.

- (d) Officer in charge.—The supervisor or such other officer as the Secretary may designate to supervise technical operations for the development and production of oil and gas on restricted Indian lands. Over such lands the officer so designated shall exercise the authority and power and perform the daties of supervisor as provided in these regulations.
- (e) Superintendent.—The superintendent of an Indian agency, or other officer authorized to act in matters of record, law, and collections with respect to oil or gas leases for restricted Indian lands.
- of covenants to be observed, grants to a lessee the exclusive right and privilege of developing and producing oil or gas deposits owned by the lessor subject to these oil and gas operating regulations.
- [fol. 156] (g) Leased lands, leasehold.—Lands and deposits covered by a lease as defined in paragraph (f), supra.
- (h) Producing lease.—A producing lease is one including land on which there is a producible well, either active or shut in, or land determined by the supervisor to be subject to subsurface drainage.
- (i) Lessor.—The party to a lease who holds title to the leased lands.
- (j) Lessee.—The party authorized by a lease, or approved assignment thereof, to develop and produce oil or gas on the leased lands in accorddance with these oil and gas operating regulations, including all parties holding such authority by or through him.
- (k) Register.—A representative of the General Land Office in charge of a District Land Office.
- (1) Operator.—The individual, partnership, firm, or corporation that has control or management of operations on the leased land or a portion thereof. The

operator may be a lessee, designated agent of the lessee, or holder of rights under an approved operating agreement.

- (m) Designated Operator or Agent.—The local representative of the lessee or of the operator; may be the holder of operating rights under an approved operating agreement.
 - (n) Waste of oil or gas.—Waste of oil or gas, in addition to its ordinary meaning, shall mean the physical waste of oil or gas, and waste, loss, or dissipation of reservoir energy existent in any deposit containing oil or gas and necessary or useful in obtaining the maximum recovery from such deposit.
 - 1. Physical waste of oil or gas shall be deemed to include the loss or destruction of oil or gas after recovery thereof such as to prevent proper utilization and beneficial use thereof, and the loss of oil or gas prior to recovery thereof by isolation or entrapment, by migration, by premature release of natural gas from solution in oil, or in any other manner such as to render impracticable the recovery of such oil or gas.
 - 2. Waste of reservoir energy shall be deemed to include the failure reasonably to maintain such energy by artificial means and also the dissipation of gas energy, hydrostatic energy, or other natural reservoir energy, at any time at a rate or in a manner which would constitute improvident use of the energy available or result in loss thereof without reasonably adequate recovery of oil.
 - (o) Gas.—Any fluid, either combustible or noncombustible, which is produced in a natural state from the earth and which maintains a gaseous or rarefied state at ordinary temperature and pressure conditions.
 - (p) Oil, erude oil.—Any liquid hydrocarbon substance which occurs naturally in the earth, including drip gasoline or other natural condensates recovered from gas, without resort to manufacturing process.*

[•] For statutory citations, see note to 221.1.

[fol. 157] Jurisdiction and Functions of Supervisor

221.3 Jurisdiction. Drilling and producing operations, handling and gaging of oil and the measurement of gas or other products, determination of royalty liability, receipt and delivery to those entitled thereto of royalty accruing to the lessor and paid in amount of production, determination of amount and manner of payment of damages assessed under authority of these oil and gas operating regulations for defaults or noncompliance with duties by the lessee and, in general, all operations subject to these regulations are under the jurisdiction of the supervisor for any district as delineated by the Director, As to producing leases of Indian lands, the officer in charge, and as to lands within naval petroleum reserves, the supervisor shall determine rental liability, record rentals, royalties, and other payments, and maintain lease accounts. Upon request, the supervisor or the Director, will advise any person concerning these oil and gas operating regulations, and will furnish technical information and advice relative to oil and gas development and operation on lands subject hereto.*

221.4 General functions. The supervisor is hereby authorized to require compliance with lease terms, with these oil and gas operating regulations, and all other applicable regulations, and with applicable law to the end that all operations shall conform to the best practice and shall be conducted in such manner as to protect the deposits of the leased lands and result in the maximum ultimate recovery of oil, gas, or other products with minimum waste. Inasmuch as conditions in one area may vary widely from conditions in another area; these oil and gas operating regulations are general, and detailed procedure hereunder in any particular area is subject to the judgment and discretion of the supervisor, and to any areal plan of development that may be adopted pursuant to law. The supervisor may require satisfactory evidence that a lease is in good. standing, that the lessee or operator is authorized to conduct operations, and that an acceptable bond has been filed before permitting operations on the leased land,"

221.5 Supervision of operations. The supervisor shall inspect and supervise operations under these oil and gas

^{*} For statutory citations, see note to 221.1.

operating regulations; prevent waste, damage to formations or deposits containing oil, gas, or water or to coal measures or other mineral deposits, and injury to life or property; and shall issue instructions necessary, in his judgment, to accomplish these purposes.*

221.6 Reports and recommendations. The supervisor shall make reports to his superior administrative officer as to the general condition of leased lands, and the manner in which operations are being conducted and departmental orders are being obeyed, and submit from time to time information and recommendations for safeguarding and protecting surface property and underlying mineral-bearing formation.

221.7 Reports and notices. The supervisor shall prescribe the manner and form in which records of all operations, reports, and notices shall be made by lessees and operators.

221.8 Required samples, tests, and surveys. When deemed necessary or advisable, the supervisor is authorized to require that adequate samples be taken and tests or surveys be made in an acceptable manner without cost to the lessor to determine the identity and character of formations; the presence or watte of oil, gas, water, or reservoir energy; the quantity and quality of oil, gas, or water; the amount and direction of deviation of any well from the vertical; formation, casing, tubing, or other pressures; and whether operations are being conducted with due regard to the interest of the lessor.

221.9 Damage to mineral deposits, directional drilling, lease obligations, well abandonment. The supervisor shall require correction, in a manner to be prescribed or ap-[fol. 158] proved by him, of any condition which is causing or is likely to cause damage to any formation containing oil, gas, or water or to coal measures or other mineral deposits, or which is dangerous to life or property or wasteful of oil, gas, or water; require substantially vertical drilling when necessary to protect interests in other properties; demand drilling in accordance with the terms of the lease or of these oil and gas operating regulations; and require

^{*} For stability citations, see note to 221.1.

plugging and abandonment of any well or wells no longer used or useful in accordance with such plan as may be approved or prescribed by him, and, upon failure to secure compliance with such requirement, perform the work at the expense of the lessee, expending available public funds, and submit such report as may be needed to furnish a basis for appropriate action to obtain reimbursement.

visor is authorized to fix the percentage of the potential capacity of any oil or gas well that may be utilized or the permissible production of any such well when, in his opinion, such action is necessary to protect the interests of the lessor, or to conform with proration rules established for the field; and to specify the time and method for determining the potential capacity of such wells.

221.11 Well-spacing and well-casing, technical assistance to lessees. The supervisor shall approve well-spacing and well-casing programs determined to be necessary for the proper development of the leases and assist and advise lessees in the planning and conduct of tests and experiments for the purpose of increasing the efficiency of operations.

221.12 Production records; rentals, royalties, and payments; drainage and waste. The supervisor shall compileand maintain records of production and prices and determine royalties accrued, estimate drainage and compute losses to the lessor resulting therefrom, and estimate the amount and value of oil, gas, and other products wasted. The supervisor shall render monthly to the lessee, or his agent, statements showing the amount of oil, gas, casinghead or natural gasoline, propane, butane, or other hydrocarbons produced or sold and the amount or value of production accruing to the lessor as royalty from each lease; the loss by drainage or waste and the compensation due to the lessor as reimbursement; and, except as to any disposal of gas that shall have been determined by the Secretary of the Interior to be sanctioned by the laws of the United States and of the State in which it occurs, the amount and full value, computed at a price of not less than 5 cents per 1,000 cubic feet, of all gas wasted by blowing, release, escape into the air, or otherwise. Also, as to producing leases of

[·] For statutory citations, see note to 221.1.

Indian lands and lands within naval petroleum reserves, the supervisor shall determine rental liability, record rental, royalty, and other payments, and maintain lease accounts.

221.13 Division orders, run tickets, sales agreements or contracts. The supervisor is authorized to approve, subject to such conditions as he shall prescribe, division orders or temporary purchase agreements granting to transportation agencies or purchasers authority to receive products from leased lands in accordance with Government rules and regulations; sign run tickets or other receipts for royalty oil of gas delivered to a representative of the lessor or to the lessor's account; and approve sales agreements and contracts; subject to any conditions, modification, or revocation that may be prescribed on review thereof by the Secretary.

221.14 Suspension of operations and production. On receipt of an application for suspension of operations or production or for relief from any drilling or producing requirement under a lease; the supevisor shall forward such application, with a report and recommendation, to the appropriate official and, pending action thereon, grant such temporary approval as he may deem warranted in the premises, or reject such application, subject to the right of appeal as provided in Sec. 221.66, infra.*

[fol. 159] 221.15 Beginning or resumption of drilling or producing operations. Where drilling or producing operations have been suspended on a lease, the supervisor may approve in writing notice by the lessee of intention to begin or resume such operations; provided, that, whenever it appears from facts adduced by or furnished to him that the interests of the lessor require additional drilling or producing operations, the supervisor may require by notice in writing the beginning or resumption of such operations.

221.16 Enforcement. The supervisor shall enforce these oil and gas operating regulations, and his orders issued pursuant thereto by action provided for in Secs. 221.53 and 221.54 of these operating regulations, whenever, in his judgment, such action is necessary or advisable.*

For statutory citations, see note to 221.1.

221.17 Appeals action. The supervisor shall receive and promptly render his decision on any matter-presented for reconsideration pursuant to Sec. 221.66, infra, and shall receive and promptly transmit for review all appeals—pursuant to said Sec. 221.66, together with his report in the premises.*

Requirements for All Lessees (Including Designated)
Operators).

221.18 Lease terms, regulations, instructions of supervisor, waste, damage, safety, and bond. The lessee shall comply with the terms of the lease, and of these regulations and any amendments thereof, and with the written instructions of the supervisor, shall take all reasonable precautions to prevent waste, damage to formations or deposits containing oil, gas, or water or to coal measures or other mineral deposits, and injury to life or property, and before drilling or other operations are started, shall have submitted a satisfactory bond.

221.19 Designated operator (or agent). In all cases where operations on a lease are not conducted by the record owner, but are to be conducted under authority of an operating agreement, an unapproved assignment, or other arrangement, a "designation of operator" shall be submitted to the supervisor, in a manner and form approved by the supervisor, prior to commencement of opera-If the designation of operator form cannot be obtained from the lessee without undue inconvenience to the operator, the supervisor in his discretion may accept in lieu thereof a valid operating agreement approved by the A designation of operator will be accepted as authority of operator or his local representative to fulfill the obligations of the lessee and to sign, as operator, any papers or reports required under these oil and gas operating regulations. It will rest in the discretion of the supervisor to determine how a local representative of the operator empowered to act in whole or in part in his stead shall be identified.

If the designated operator shall at any time be incapacitated for duty or absent from his designated address, the operator or the lessee shall designate in writing a sub-

^{*} For statutory citations, see note to 221.1.

stitute to serve in his stead, and, in the absence of such operator or of notice of the appointment of a substitute, any employee of the lessee who is on the leased lands or the contractor or other person in charge of operations will be considered the agent of the lessee for the service of orders or notices and service in person or by ordinary mail upon any such employee, contractor, or other person will be deemed service upon the operator and the lessee. All changes of address and any termination of the operator's authority shall be immediately reported, in writing, to the supervisor or his representative. In case of such termination or of controversy between the lessee and the designated operator, the operator, if in possession of the lease-hold will be required to protect the interests of the lessor.

[fol. 160] 221.20 Well-Location Restrictions. (a) The lessee shall not drill any well within 200 feet of any of the outer boundaries of the leased lands except where necessary to protect those lands against wells on land the title to which is not held by the lessor, and then only on consent first had in writing from the supervisor; provided, that for good cause shown in any particular case, and where not prohibited by law, a lessee may be relieved of such restrictions on written consent of the supervisor. The lessee shall not drill any well within 200 feet of the boundary of any legal subdivision without first submitting adequate reasons therefor and obtaining consent/in writing from the supervisor, such consent to be subject to such conditions as may be prescribed by said official.

(1) Lessees of Indian lands shall not drill any well within 200 feet of any house or barn standing on the leased lands without the lessor's written consent, approved by the officer in charge and the superintendent.

221.21 Well-spacing and well-casing program, well operations, required offsets, diligence, compensation in lieu of drilling. When required by the supervisor, the lessee shall submit an acceptable well-spacing and well-casing program for the lease or area. Such program must be approved by the supervisor and may be modified from time to time as conditions warrant, with the consent and approval of the supervisor.

^{*} For statutory citations, see note to 221.1.

The lessee shall not begin to drill, redrill, repair, deepen, plug back, shoot, or plug and abandon any well, make water shut-off or formation test, alter the casing or liner, stimulate production by vacuum, acid, gas, air, water injection, or any other method, change the method of recovering production, or use any formation or well for gas storage or water disposal without first notifying the supervisor of his plan and intention and receiving written approval prior to commencing the contemplated work.

The lessee shall drill diligently and produce continuously from such wells as are necessary to protect the lessor from loss of royalty by reason of drainage, or, in lieu thereof, with the consent of the supervisor, he must pay a sum estimated to reimburse the lessor for such loss of royalty, the

sum to be computed monthly by the supervisor.

The lessee, whenever drilling or producing operations are suspended for 24 hours or more, shall close the mouth of the well with a suitable plug or other fittings acceptable to the supervisor.

221.22 Well designations, property boundaries, markers The lessee shall mark each and every for abandoned wells. derrick or well in a conspicuous place with his name or the name of the operator, the serial number of the lease or the name of the lessor if on Indian land, and the number and location of the well, and shall take all necessary means and precautions to preserve these markings. All abandoned wells shall be marked with a permanent monument, on which shall be shown the number and location of the well, unless this requirement is waived in writing by the supervisor. ... This monument shall consist of a piece of pipe not less than 4 inches in diameter and not less than 10 feet in length, of which 4 feet shall be above the general ground level, the remainder being embedded in cement. The top of the pipe must be closed with a screw cap, cement plug, or by other approved means.*

221.23 Well records and reports, plats and maps, samples, tests, and surveys. The lessee shall keep on the leased lands or at his headquarters in the field, or otherwise conveniently available to the supervisor, accurate and complete records of the drilling, redrilling, deepening, repair-

[•] For statutory citations, see note to 221.1.

ing, plugging, or abandoning of all wells and of all other well operations, and of all alterations to casing. These records shall show all the formations penetrated, the con[fol. 161] tent and character of oil, gas, or water in each formation, and the kind, weight, size, and landed depth of casing used in drilling each well on the leased lands, and any other information obtained in the course of well operations.

Within 15 days after the completion of any well and within 15 days after the completion of any further operations on it, the lessee shall transmit to the supervisor copies of these records on forms furnished by the supervisor. (For reports to be made by all lessees or their designated

operators, see Secs. 221.57 to 221.65).

The lessee shall take such samples and make such tests and surveys as may be required by the supervisor with a view to determining conditions in the well and obtaining information concerning materials (formations) drilled and shall furnish such characteristic samples of each formation or substance, or reports thereon, as may be requested by the supervisor. The lessee shall gage the production of oil, gas, and water from individual wells continuously or at reasons ably frequent intervals to the satisfaction of the supervisor.

The lessee shall also submit in duplicate such other reports and records of operations as may be required and in

the manner and form prescribed by the supervisor.

Upon request and in the manner and form prescribed by the supervisor the lessee shall furnish a copy of the daily drilling report, a plat showing the location, designation, and status of all wells on the leased lands, together with such other pertinent information as the supervisor may require.*

221.24 Precautions Necessary in Areas Where High Pressures Are Likely to Exist. When drilling in "wildcat" territory, or in any field where high pressures are likely to exist, the lessee shall take all necessary precautions for keeping the well under control at all times and shall provide at the time the well is started the proper high-pressure fittings and equipment; under such conditions the conductor string of casing must be cemented throughout its length, unless other procedure is authorized or prescribed by the supervisor, and all strings of casing must be securely anchored.*

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^{*} For statutory citations, see note to 221.1.

221.25 Cable Tool Drilling Precautions. When drilling with cable tools, the lessee shall provide at least one properly prepared slush pit, into which must be deposited mud and cuttings from clay or shale free of sand that will be suitable for the mudding of a well. When necessary or required, the lessee shall provide a second pit for sand pumpings and other materials obtained from the well during the process of drilling that are not suitable for mudding.*

221.26 Rotary Tool Drilling Precautions: When drilling with rotary tools, the lessee shall provide, when required by the supervisor, an auxiliary mud pit or tank of suitable capacity and maintain therein a supply of mud having the proper characteristics for emergency use in case of blowouts or lost circulation.*

221.27 Vertical Drilling. The lessee shall drill substantially vertical wells, material deviation from the vertical being permitted only on written approval of the supervisor; and where interests in other properties will not be unfairly affected.

221.28 Water Shut-offs, Formation Tests. By approved methods, the lessee shall shut off and exclude all water from any oil- or gas-bearing stratum to the satisfaction of the supervisor, and to determine the effectiveness of such operations, the lessee shall make a casing and a water shut-off test before suspending drilling operations or drilling into the oil or gas sand and completing the well.

The lessee shall test for commercial productivity all formations that give evidence of carrying oil or gas, the test to be made to the satisfaction of and in a manner approved [fol. 162] in advance by the supervisor. Unless otherwise specifically approved by the supervisor, formation tests shall be made at the time the formations are penetrated and in the absence of excessive back pressure from a column of water or mud fluid. Records of such tests shall be furnished in duplicate.*

shall not deepen an oil or gas well for the purpose of producing oil or gas from a lower stratum until all upper productive strata are protected to the satisfaction of the supervisor.

^{*} For statutory citations, see note to 221.1.

221.30 Open Flows and Control of "Wild" Wells. The lessee shall take reasonable precautions to prevent any oil, gas, or water well from blowing open, or "wild", and shall take immediate steps and exercise due diligence to bring under control any such well or burning oil or gas well."

221.31 Emulsion and Dehydration. The lessee shall complete and maintain his wells in such mechanical condition and operate them in such manner as to prevent, as far as possible, the formation of emulsion, or so-called B. S., and the infiltration of water. If the formation of emulsion, or B. S., or the infiltration of water, cannot be prevented or if all or any part of the product is unmarketable by reason thereof or on account of any impurity or foreign substance, the lessee shall put into marketable condition, if commercially feasible, all products produced from the leased land and pay royalty thereon without recourse to the lessor for deductions on account of costs of treatment or of costs of shipping. To avoid excessive losses from evaporation, oil shall not be heated to temperatures above the minimum required to put the oil into marketable condition. If excessive temperatures are required to break down an emulsion, then other means of dehydration must be utilized. Under such circumstances the supervisor must be consulted, and his approval obtained.*

221.32 Pollution and Surface Damage. The lessee shall not pollute streams or damage the surface or pollute the underground water of the leased or other land. If useless liquid products of wells cannot be treated or destroyed or if the volume of such products is too great for disposal by usual methods without damage, the supervisor must be consulted, and the useless liquids disposed of by some method approved by him.*

221.33 Gaging and Storing Oil. All production run from leased lands shall be gaged or measured according to methods approved by the supervisor. The lessee shall provide tanks located on the leasehold, unless otherwise approved by the supervisor, suitable for containing and measuring accurately all crude oil produced from the wells and shall furnish to the supervisor at least two acceptable positive copies

^{*} For statutory citations, see note to 221.1.

of 100 percent-capacity tank tables. Meters for measuring oil must be first approved by the supervisor, and tests of their accuracy shall be made when directed by that official. The lessee shall not, except during an emergency and except by special permission of the supervisor, confirmed in writing, permit oil to be stored or retained in earther reservoirs or in any other receptacle in which there may be undue waste of oil.*

The lessee shall promptly 221.34 Well Abandonment. plug and abandon or condition as a water well any well on the leased land that is not used or useful for the purposes of the lease, but no productive well shall be abandoned until its lack of capacity for further profitable production of oil or gas has been demonstrated to the satisfaction of the supervisor. Before abandoning a well the lessee shall submit to the supervisor a statement of reasons for abandonment and his detailed plans for carrying on the necessary work, together with duplicate copies of the log, if it has not already been submitted. A well may be abandoned only after receipt of written approval by the supervisor, in which the manner and method of abandonment shall be approved or prescribed. Equipment shall be removed and premises at the well-site shall be properly conditioned immediately after plugging operations are completed on any well.

[fol. 163] In case the lessee of lands of the United States strikes water while drilling, instead of oil or gas, and the water is of sufficient quantity and suitable quality to be valuable and usable at a reasonable cost, the Secretary may take over the well as provided in section 40 of the Mineral Leasing Act approved June 16, 1934, 48 Stat. 977, 30. U. S. C. 229a. If a satisfactory agreement is reached, the lessee may condition the well for a water well in lieu of plugging and

abandonment.

Drilling equipment shall not be removed from any suspended drilling well without first securing the written consent of the supervisor.*

221.35 Waste Prevention, Beneficial Use. The lessee is obligated to prevent the waste of oil or gas and to avoid physical waste of gas the lessee shall consume it beneficially or market it or return it to the productive formation. If

^{*} For statutory citations, see note to 221.1.

waste of gas occurs the lessee shall pay the lessor the full value of all gas wasted by blowing, release, escape, or otherwise, at a price not less than 5 cents for each 1,000 cubic feet, unless, on application by the lessee, such waste of gas under the particular circumstances involved shall be determined by the Secretary to be sanctioned by the laws of the United States and of the State in which it occurs. The production of oil and gas shall be restricted to such amount as can be put to beneficial use with adequate realization of values, and in order to avoid excessive production of either oil or gas, when required by the Secretary, shall be limited by the market demand for gas or by the market demand for oil.*

221.36 Accidents and Fires. The lessee shall take all reasonable precautions to prevent accidents and fires, shall notify the supervisor within 24 hours of all accidents or fires on the leased land, and shall submit a full report there a within 15 days.*

221.37 Workmanlike Operations. The lessee shall carry on all operations and maintain the property at all times in a safe and workmanlike manner, having due regard for the preservation and the conservation of the property and for the health and safety of employees. The lessee shall take reasonable steps to prevent and shall remove accumulations of oil or other materials deemed to be fire hazards from the vicinity of well locations and lease tanks, and shall remove from the property or store in orderly manner all scrap or other materials not in use.*

221.38 Sales Contracts, Division Orders. The lesses shall file with the supervisor triplicate (quadruplicate for production of restricted Indian lands or naval petroleum reserves) executed copies of all contracts for the disposition of all products of the leased land except that portion used for purposes of production on the leased land or unavoidably lost, and he shall not sell or otherwise dispose of said products except in accordance with the sales contract, division order, or other arrangement first approved, as provided in Sec. 221.13, supra.*

221.39 Relief from Operating, Royalts, and Rental Requirements. Applications for any modification authorized

^{*} For statutory citations, see note to 221.1.

by law of the operating requirements of a lease for lands of the United States shall be filed in triplicate (quintuplicate for applications involving leases for lands within the naval petroleum reserves) with the supervisor, and shall include a full statement of the circumstances that render such modification necessary or proper. Applications for any modification authorized by law of the royalty or rental requirements of a lease for lands of the United States shall be filed in duplicate in the United States land office of the district in which the land is situated, and report thereon will be made by the supervisor.

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money, the lessee shall tender all payments. When due in money, the lessee shall tender all payments of rental and royalty by check or draft on a solvent bank, or by money order drawn to the order of the appropriate receiving officiol. 164] cer, in accordance with statements rendered by the supervisor pursuant to Sec. 221.12, supra, or in the case of public-land leases in accordance with instructions of the General Land Office.

. If the lessor elects to take royalty in oil or gas, unless otherwise agreed upon, such royalty shall be delivered on the leasehold, by the lessee to the order of and without cost to the lessor, as instructed by the supervisor. Upon the lessor's request, storage for royalty oil for 30 days after the end of the calendar month in which the royalty accrues, shall be furnished free of charge. Storage shall be provided on the leased lands or at a place mutually agreed upon by the supervisor and the lessee.*

221.41 Surface Rights on Indian Lands. Lessees of Indian land shall have only such surface rights as are specifically granted in the lease, but additional rights may be exercised under written agreement with the owner, such agreement to be subject to the prior approval of the superintendent of the Indian agency having jurisdiction. On demand of the supervisor, pipe lines on Indian land shall be buried below plow depth.*

221.42 Costs or Damages.1 The lessee-shall pay all costs

^{*} For statutory citations, see note to 2/1.1.

Cross reference: For other liabilities of the lessee in case of default see also Secs. 221.53 to 221.56, infra.

or damages assessed under the provisions of these oil and gas operating regulations.*

Measurement of Production and Computation of Revalties

221.43 Measurement of Oil. The volume of production shall be computed in terms of barrels of clean oil of 42 standard United States gallons of 231 cubic inches each, on the basis of meter measurements (meter must be approved by supervisor), or tank measurements of oil-level differences, made and recorded to the nearest quarter inch of 100-percent-capacity tables, or with such greater accuracy as shall be required by the supervisor, and subject to the following corrections.

- (a) Correction for Impurities.—The percentage of impurities (water, sand, and other foreign substances not constituting a natural component part of the oil) shall be determined to the satisfaction of the supervisor, and the observed gross volume of oil shall be corrected to exclude the entire volume of such impurities.
- (b) Temperature Correction.—The observed volume of oil corrected for impurities shall be further corrected to the standard volume at 60° F. in accordance with table 2 of Circular C-410 of the National Bureau of Standards (March 4, 1936) or any revisions thereof and any supplements thereto, or any close approximation thereof approved by the supervisor.
- (c) Gravity Determination.—The gravity of the oil at 60° F, shall be determined in accordance with table 1 of Circular C-410 of the National Bureau of Standards (March 4, 1936) or any revisions thereof and any supplements thereto.
- (d) Lease Production, Pipe-line Runs.—For the convenience of the lessor and lessee, monthly statements of production and royalty shall be based in general on production recorded in pipe-line runs or other shipments. When shipments are infrequent or do not approximate actual production, the supervisor may require statements of production and royalty to be made on such [fol. 165] other basis as he may prescribe, gains, or

For statutory citations, see note to 221.1.

losses in volume of storage being taken into account when appropriate. Evidence of all shipments of oil shall be furnished by pipe-line or other run tickets signed by representatives of the lessee and of the purchaser who have witnessed the measurements reported and the determinations of gravity, temperature, and the percentage of impurities contained in the oil. Signed run tickets shall be filed with the supervisor within 5 days after the oil has been run.*

221.44 Measurement of Gas. Gas of all kinds (except gas used for purposes of production on the leasehold or unavoidably lost) is subject to royalty, and all gas shall be measured by meter (preferably of the orifice-meter type) unless otherwise agreed to by the supervisor. All gas meters must be approved by the supervisor and installed at the expense of the lessee at such places as may be agreed to by the supervisor. For computing the volume of all gas produced, sold, or subject to royalty, the standard of pressure shall be 10 ounces above an atmospheric pressure of 14.4 pounds to the square inch, regardless of the atmospheric pressure at the point of measurement, and the standard of temperature shall be 60° F. All measurements of gas shall be adjusted by computation to these standards, regardless of the pressure and temperature at which the gas was actually measured, unless otherwise authorized in writing by the supervisor.*

221.45 Determination of Gasoline Content of Natural Gas. Tests to determine the gasoline content of gas delivered to plants manufacturing gasoline are required to cheek plant efficiency and to obtain an equitable basis for allocating the gasoline output of any plant to the several sources from which the gas treated is derived. The gasoline content of the gas delivered to each gasoline plant treating gas from leased lands shall be determined periodically by field tests, as required by the supervisor, to be made at the place and by the methods approved by him and under his supervision.

221.46 Quantity Basis for Computing Royalties on Natural Gasoline, Butane, Propane, and Other Liquid Hydrocarbon Substances Extracted from Gas. The primary quan-

^{*} For statutory citations, see note to 221.1.

tity basis for computing monthly royalties on casing-head or natural gasoline, butane, propane, or other liquid hydrocarbon substances extracted from gas is the monthly net output of the plant at which the substances are manufactured, "net output" being defined as the quantity of each such substance that the plant produces for sale.

- (a) If the net output of a plant is derived from the gas obtained from only one leasehold, the quantity of gasoline or other liquid hydrocarbon substances on which computations of Poyalty for the lease are based is the net output of the plant.
- (b) If the net gasoline output of a plant is derived from gas obtained from several leaseholds producing gas of uniform gasoline content, the proportion of net output of gasoline allocable to each lease as a basis for computing royalty will be determined by dividing the amount of gas delivered to the plant from each leasehold by the total amount of gas delivered to the plant from all leaseholds.
- (c) If the net gasoline output of a plant is derived from gas obtained from several leaseholds producing gas of diverse gasoline content, the proportion of net output of gasoline allocable to each leasehold as a basis for computing royalty will be determined by multiplying the amount of gas delivered to the plant from the leasehold by the gasoline content of the gas and dividing the arithmetical product thus obtained by the sum of the similar arithmetical products separately obtained for all leaseholds from which gas is delivered to the plant.
 - [fol. 166] (d) If the net output of butane, propane, or other liquid hydrocarbon substances of a plant is derived from gas obtained from several leaseholds, the proportion of net output of such substances allocable to each leasehold as a basis for computing royalty will be determined by substituting the butane, propane, or other liquid hydrocarbon content for the gasoline content and following the method outlined in subsection 221.46 (b) or (c), supra, whichever is applicable; provided that when in the judgment of the supervisor it is impracticable to test gas to determine the content of

butane, propane, or other liquid hydrocarbon substances, the gasoline content will be used in determining the proportion of the net output of such substances allocable to each leasehold.

(e) The supervisor is authorized, whenever in his judgment neither method prescribed in subsection 221.46 (b) and (c) is practicable, to estimate the production of natural gasoline, butane, propane, or other liquid hydrocarbon substances from any leasehold from (1) the quantity of gas produced from the leasehold and transmitted to the extraction plant, (2) the gasoline, butane, propane, or other liquid hydrocarbon content of such gas as determined by test, and (3) a factor based on plant efficiency or recovery and so determined as to insure full protection of the royalty interest of the lessor.

221.47 Value Basis for Computing Royalties. The value of production, for the purpose of computing royalty shall be the estimated reasonable value of the product as determined by the supervisor, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field, to the price received by the lessee; to posted prices and to other relevant matters. Under no circumstances shall the value of production of any of said substances for the purposes of computing royalty be deemed to be less than the gross proceeds accruing to the lessee from the sale thereof or less than the value computed on such reasonable unit value as shall have been determined by the Secretary. In the absence of good reason to the contrary, value computed on the basis of the highest price per barrel, thousand cubic feet, or gallon paid or offered at the time of production in a fair and open market for the major portion of like-quality oil, gas, or other products produced and sold from the field or area where the leased lands are situated will be considered to be a reasonable value.*

221.48 Royalty Rates on Oil, Flat-rate Leases. The royalty on crude oil shall be the percentage (established by the terms of the lease) of the value or amount of the crude oil produced from the leased lands.*

[·] For statutory citations, see note to 221.1.

221.49 Royalty Rates on Oil, Sliding- and Step-scale Leases (Public Land Only). Sliding- and step-scale royalties are based on the average daily production per well. The supervisor shall specify which wells on a leasehold are commercially productive, including in that category all wells, whether produced or not, for which the annual value of permissible production would be greater than the estimated reasonable annual lifting cost, but only wells which yield a commercial volume of production during at least part of the month shall be considered in ascertaining the average daily production per well. The average daily production per well for a lease is computed on the basis of a 28-, 29-, 30-, or 31-day month (as the case may be), the number of wells on the leasehold counted as producing and the gross, production from the leasehold. (Tables for computing royalty on the sliding-scale and on the step-scale basis may be obtained upon application to the supervisor). The supervisor will determine which commercially productive wells shall be considered each month as producing wells for the purpose of computing royalty in accordance with the following rules, and in his discretion may count as producing any commercially productive well shut-in for conservation purposes:

[fol. 167] (a) For a previously producing leasehold, count as producing for every day of the month each previously producing well that produced 15 days or more during the month, and disregard wells that produced less than 15 days during the month,

- (b) Wells approved by the supervisor as input wells shall be counted as producing wells for the entire month if so used 15 days or more during the month and shallche disregarded if so used less than 15 days during the month.
- (c) When the initial production of a leasehold is made during the calendar month, compute royalty on the basis of producing well-days.
- (d) When a new well is completed for production on a previously producing leasehold and produces for 10 days or more during the calendar month in which it is brought in, count such new wells as producing every day of the month, in arriving at the number of producing well-days. Do not count any new well that produces for less than 10 days during the calendar month.

- (e) Consider "head wells" that make their best production by intermittent pumping or flowing as producing every day of the month, provided they are regularly operated in this manner, with approval of the supervisor.
- (f) For previously producing leaseholds on which no wells produced for 15 days or more, compute royalty on a basis of actual producing well-days.
- (g) For previously producing leaseholds on which no wells were producing during the calendar month but from which oil was shipped, compute royalty at the same royalty percentage as that of the last preceding calendar month in which production and shipments were normal.
- (h) Rules for special cases not subject to definition, such as those arising from averaging the production from two distinct sands or horizons when the production of one sand or horizon is relatively insignificant compared to that of the other, shall be made by the supervisor as need arises.
- (i) In the following summary of operations on a typical leasehold for the month of June, the wells considered for the purpose of computing royalty on the entire production of the property for the month are indicated.

	• /-	Count
Well		(marked:
No,	Record	X)
1	Produced full time for 30 days	X
	Produced for 26 days;	
	down 4 days for repairs	X
3	Produced for 28 days; down June 5, 12	
	hours, rods; June 14, 6 hours, engine down;	
	June 25, 24 hours; June 26, 24 hours pulling	
	rods and tubing	X
5.	Produced for 12 days; down June 13 to 30	. X
5 .	Produced for 8 hours every other day.	
*	(head well)	X
6	Idle producer (not operated)	
7	New well, completed June 17;	
	produced for 14 days	X
8-	New well, completed June 22;	
	produced for 9 days	

In this example there are eight wells on the leasehold, but wells 4, 6, and 8 are not counted in computing royalties.

Wells 1, 2, 3, 5, and 7 are counted as producing for 30 days. [fol. 168] The average production per well per day is determined by dividing the total production of the leasehold for the month (including the oil produced by wells 4 and 8) by 5, the number of wells counted as producing, and dividing the quotient thus obtained by the number of days in the month.*

221.50 Royalty on Gas. The royalty on gas shall be the percentage established by the terms of the lease of the value or amount of the gas produced.

- (a) Royalty accrues on dry gas, whether produced as such or as residue gas after the extraction of gasoline.
- (b) If the lessee derives revenue on gas from two or more products, a royalty normally will be collected on all such products:
- (c) For the purpose of computing royalty the value of wet gas shall be either the gross proceeds accruing to the lessee from the sale thereof or the aggregate value determined by the Secretary of all commodities, including residue gas, obtained therefrom, whichever is greater.

221.51 Royalty on casing-head or natural grsoline, butane, propane, or other liquid hydrocarbon substances extracted from gas. A revalty as provided in the lease shall be paid on the value of one-third (or the lessee's portion if greater than one-third) of all-casing-head or natural gasoline, butane, propane, or other liquid hydrocarbon substances extracted from the gas produced from the leasehold. The value of the remainder is an allowance for the cost of manufacture, and no royalty thereon is required. The value shall be so determined that the minimum royalty accruing to the lessor shall be the percentage established by the lease of the amount or value of all extracted hydrocarbon substances accruing to the lessee under an arrangement, by contract or otherwise, for extraction and sale that has been approved by the supervisor:

(a) When a minimum price established by the Secretary is used in determining the value of natural gaso-

^{*} For statutory citations, see note to 221.1.

line accruing to the lessee, the volume of such gasoline may be corrected when deemed necessary by the supervisor to such standard and by such method as may be approved by the supervisor, in order that volumetric differences between natural gasolines of various specifications may be equitably adjusted.

(b) The present policy is to allow the use of a reasonable amount of dry gas for operation of the gasoline plant, the amount allowed being determined or approved by the supervisor, but no allowance shall be made for boosting residue gas, or other expenses incidental to marketing.*

221.52 Royalty on drip gasoline or other natural condensate. The royalty on all drip gasoline, or other natural condensate recovered from gas produced from the leased lands without resort to manufacturing process shall be the same percentage as provided in the lease for other oil, except that such substance, if processed in a casing-head gasoline plant-shall be treated for royalty purposes as though it were gasoline.*

Procedure in Case of Default by Lessee

221.53 Shutting down operations, lease cancelations. The supervisor has authority to shut down any operation and place under seal any property or equipment for failure to comply with these oil and gas operating regulations or orders issued hereunder, to enter upon any leasehold and perform any operation that the lessee fails to perform when [fol. 169] ordered so to do in writing, and to recommend cancelation of the lease and forfeiture under the bond for noncompliance with the applicable law, lease terms and regulations.*

221.54 Liquidated damages. Administrative costs arising out of certain defaults or violations of orders requiring the performance of certain duties by lessees, as set fortir in these oil and gas operating regulations, constitute loss or damage to the United States the amount of which is difficult or impracticable of ascertainment. Therefore, the following amounts shall be deemed to cover such loss or damage and shall be payable upon receipt of notice from the

^{*} For statutory citations, see note to 221.1.

oil and gas supervisor of such loss or damage; provided, that as to subsection (f) hereof the specified loss or damage shall be applicable to each week or fraction thereof during which the violation continues and as to subsection (h) here of the specified loss or damage shall be applicable to each day or fraction thereof during which the violation continues.

- (a) For failure to perform any operation ordered in writing by the supervisor, if said operation is thereafter performed by or through the supervisor, the actual cost of performance thereof and an additional 25 percent to compensate the Government for administrative costs.
- (b) For failure to maintain inviolate any scal placed upon any property or equipment by the supervisor, \$50 for each violation.
- (c) For failure to file notice of intention and to obtain approval before starting to drill, or for failure to file notice and obtain approval before making any changes in the originally approved notice of intention, \$25 for each violation.
- (d) For failure to file notice and to obtain approval before repairing, redrilling, deepening, plugging-back, plugging, or abandoning any well, in pulling or altering casing, stimulating production by vacuum, acid, or shot, or gas, air, or water injection, or using any well or formation for gas storage or water disposal, \$25 for each violation.
- (e) For failure to mark wells or derricks, \$10 for each violation.
- (f) For failure to install required high-pressure fittings and equipment, to cement conductor, string, or to anchor properly all strings of casing, \$50 for each violation.
- (g) For failure to construct and maintain in proper condition slush or mud pits, \$10 for each violation.
- (h) For failure to comply with Sec. 221.32. supra, \$25 for each violation.
- (i) For failure to file sales contracts or division orders as required by lease terms, \$25 for each violation,

and for failure to submit pipe-line run tickets, or other proper evidence of disposal as required by these regulations, \$10 for each violation.

- (j) For failure to file the following reports within the time specified in these oil and gas operating regulations, or within such other time designated in writing by the supervisor, \$10 for each violation:
- 1. Log of well, subsequent report of drilling, redrilling, deepening, plugging-back, plugging and abandon [fol. 170] ment, making water shut-off or formation test, stimulating production by acid or shot.
- 2. Lessee's Monthly Report of Operations. Daily Report of Gas-Producing Wells, when required. Lessee's Statement of Oil and Gas Runs and Royalties.
 - 3. Special forms or reports as required by the supervisor.*

221.55 Payment of Damages. Payment or request for payment for any of the damages assessed for administrative costs under these regulations shall not relieve the lessee from compliance with the provisions of these regulations, or for liability for waste or any other damage. A waiver of any particular cause for the payment of damages shall not be constitued as precluding the assessment of damages for any other cause herein specified or for the same cause occurring at any other time.

Damages shall be paid in the manner and as directed by the supervisor.*

221.56 Damages to Indian Property. Damage to lands, crops, buildings, and other improvements on Indian land shall be assessed by the superintendent, and payments for such damages shall be made to the superintendent.

Reports to Be Made By All Lessees (Including Operators)

221.57. General Requirements. Information required to be submitted in accordance with these oil and gas operating regulations shall be furnished in the manner and form prescribed in these regulations or as directed by the supervisor. Prescribed standard forms in general use are described in

^{*} For statutory citations, see note to 221.1.

Secs. 221.58-221.64, infra. Copies of such forms can be obtained from the supervisor and must be filled out completely and filed punctually with that official. Failure of the lessee to submit the information and reports required, herein constitutes noncompliance with the terms of these oil and gas operating regulations and is cause for the assessment of specific damages as prescribed by these regulations, and the cancelation of the lease.*

221.58 Sundry Notices and Reports on Wells (Form 9-331A Public; Form 9#331B (Indian). Forms 9-331A and 9-331B cover all notices of intention and all subsequent reports pertaining to individual wells except those for which special blanks are provided. The forms may be used for any of the purposes listed thereon, or a special heading may be inserted in the blank to adapt it for use for similar purposes. Any written notice of intention to do work or to change plans previously approved must be filed in triplicate. unless otherwise directed, and must reach the supervisor and receive his approval before the work is begun. The lessee is responsible for receipt of the notice by the supervisor in ample time for proper consideration and action... If, in case of emergency, any notice is given orally or by wire, and approval is obtained, the transaction shall be confirmed in writing as a matter of record. The following paragraphs illustrate some of the uses to which forms 9-331A and 9-331B may be put and indicate the requirements with respect to each use.

(a) Notice of Intention to Drill.—The notice of intention to drill a well must be filed with the supervisor and approval received before the work is begun. This notice must give the location, in feet, and direction from the nearest lines of established public survey; the altitude of the ground and derrick floor above sea level and how obtained; and the geologic name of the surface formation. Under the heading "Details of Works," the proposed drilling and casing plan should be outlined in detail. Essential information includes type of tools, proposed depth to which the well will [fol. 171] be drilled, estimated depths to the top of important markers, estimated depths at which water, oil, gas, and mineral beds are expected, the proposed

^{*} For statutory citations, see note to 221.1.

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- casing record, including the size and weight of casing, the depth at which each string is to be set, and the amount of cement and mud to be used. Information also shall be given relative to the drilling plan, such as making drill-stem tests, drilling in with oil, using reversed circulation, perforating opposite pays, using special types of mud in rotary drilling, coring at specified depths, and using electric logging together with any other information which may be required by the supervisor.
- (b) Notice of Intention to Change Plans.—Where unexpected conditions necessitate any change in the plans of proposed work already approved, complete details of the changes must be submitted to the supervisor and approval thereof obtained before the work is undertaken.
- (c) Notice of Date for Casing and Water Shut-off Test.—The protection and segregation of oil, gas, or water bearing formations is an important item of conservation, and the supervisor will witness all casing and water shut-off tests. Notice must be filed with the supervisor in advance of the date on which the lessee expects to make such test. Later by agreement the exact time shall be fixed. The casing test and the test of water shut-off must be approved before further drilling can proceed. In the event of failure, casing must be repaired or replaced or recemented, whichever the conditions may require.
- (d) Subsequent Report of Casing and Water Shutoff Test.—Within 15 days after making a casing or
 water shut-off test, the results of the test must be reported. The report must give complete and accurate
 details, amount of mud and cement used, lapse of time
 between running and cementing the casing and making
 the test, method of testing, and results.
 - (e) Notice of Intention to Redrill, Repair, or Condition Well.—Before repairing, deepening, or conditioning a well, adetailed written statement of the plan of work must be filed with the supervisor and approval obtained before the work is started. In work that affects only rods, pumps, or tubing, or other routine work, such as cleaning out to previous total depth, no

report is necessary unless specifically required by the supervisor.

- (f) Subsequent Report of Redrilling, Repairing, or Conditioning.—Within 15 days after completion of the repair work a detailed report of work done and the results obtained should be filed. Such report shall show the amount of production of oil, gas, and water, both before and after the work is done, and shall also include a complete statement of the work accomplished and methods employed, including all dates.
- (g) Notice of Intention to Use Explosive or Chemicals.-Before using explosive or chemicals (shooting or acidizing) in any well, whether for increasing production or in drilling, repair, or abandonment, notice of intention shall be filed and approval obtained before the work is done. When such notice of intention forms a part of a notice of intention to redrill, repair, or abandon a well, the supervisor may accept such notice in lieu of a separate notice of intention to use explosive or chemicals. The notice of intention to use explosive or chemicals must be accompanied by the complete log of the well to date, provided the complete log has not previously been filed, and must state the object of the work to be done, the amount and nature of the material to be used, its exact location and distribution in the well by depths, the method of localizing its effects, and the name of the company that is to do the work. The notice shall also contain an accurate statement of the dates and daily production of oil, gas, and water from the well for each of the last preceding 10 producing days.
- [fol. 172] (h) Subsequent Report of Use of Explosive or Chemicals.—After using explosive or chemicals in any well a subsequent report must be filed with the supervisor. This report shall be filed separately within 15 days after the work is done, unless such report is included in the log as a part of a report of other subsequent work done or as a part of an abandonment report any one of which shall have been filed within that period. The subsequent report of use of explosive or chemicals shall include a statement of the amount and the nature of the material used, its exact location

and distribution in the well by depths, and the method used to localize its effects. The report shall also contain an accurate statement of the dates and daily production of al, gas, and water for each of the last 10 producing days preceding the use of explosive or chemicals and a similar statement of production after the work is done. In addition, this report must include other pertinent information, such as the depth to which the well was cleaned out, the time spent in bailing and cleaning out, and any injuries to the casing or well.

- (i) Notice of Intention to Pull, Perforate, or Otherwise Alter Casing. - If any casing is to be pulled, perforated, or otherwise altered, notice of intention must be filed and approved before the work is started. notice must give full details of the contemplated work, stating fully what changes are intended and what results are anticipated. A notice of intention to perforate the casing shall state the conditions of the well that make such work desirable; whether it is to be ripped or shot, the depth, number, and size of shots. or if ripped, the depths of the rips proposed; the production of oil, gas, and water; and, if a log of the well has not already been filed, the notice should be accompanied by a duplicate copy of the log showing all casing seats as well as all water strata and all oil and gas shows.
- (j) Subsequent Report of Pulling, Perforating, or Otherwise Altering Casing.—If any casing has been pulled, perforated, or otherwise altered, the results of the work should be reported within 15 days after the completion of such work, stating exactly what was done and the results obtained, including any change in production. The report of perforating casing also should include the number, depth, and size of shots, the date shot, and who did the shooting. If ripped, the depths and number of rips should be stated. The production of oil, gas, and water obtained by the work should be shown.
- (k) Notice of Intention to Abandon Well.—Before beginning abandonment work on any well, whether drilling well, oil or gas well, water well, or so called dry hole, notice of intention to abandon shall be filed

with the supervisor and approval obtained before the work is started. The notice must show the reason for abandonment and must be accompanied by a complete log, in duplicate, of the well to date, provided the complete log has not been filed previously, and must give a detailed statement of the proposed work, including such information as kind, location, and length of plugs (by depths), and plans for mudding, cementing, shooting, testing, and removing casing, as well as any other pertinent information.

(1) Subsequent Report of Abandonment.—After a well is abandoned or plugged a subsequent record of work done must be filed with the supervisor. report shall be filed separately within 15 days after the work is done. The report shall give a detailed account of the manner in which the abandonment or plugging work was carried out, including the nature and quantities of materials used in plugging and the location and extent (by depths) of the plugs of different materials; records of any tests or measurements made and of the amount, size, and location (by depths) of casing left in the well; and a detailed statement of the volume of mud fluid used, and the pressure attained in mudding. If an attempt was made to part any casing, a complete [fol. 173] report of the methods used and results obtained must be included.*

221.59 Log and History of Well (Form 9-330). The lessee shall furnish in duplicate, on form 9-330, to the supervisor, not later than 15 days after the completion of each well, a complete and accurate log and history, in chronologic order, of all operations conducted on the well. If a log is compiled for geologic information from cores or formation samples, duplicate copies of such log shall be filed in addition to the regular log. Duplicate copies of all electric logs, temperature surveys, or direction surveys shall be furnished. The lessee shall require the drillers, whether using company labor or contract labor, to record accurately the depth, character, fluid content, and fluid levels, where possible, of each formation as it is penetrated, together with all other pertinent information obtained in

^{*} For statutory citations, see note to 221.1.

drilling the well. The practice of compiling well logs from memory, after the work has been completed, will not be permitted.

221.60 Monthly Report of Operations (Form 9-329 Public; Form 9-329A Indian). A separate report of operations for each lease must be made on form 9-329 for public land and on form 9-329A for Indian land, for each calendar month, beginning with the month in which drilling operations are initiated, and must be filed in duplicate with the supervisor on or before the 6th day of the succeeding month, unless an extension of time for the filing of such report is granted by the supervisor. The report on this form shall disclose accurately all operations conducted on each well during each month, the status of operations on the last day of the month, and a general summary of the status of operations on the leased lands, and the report must be submitted each month until the lease is terminated or until omission of the report is authorized by the supervisor.

It is particularly necessary that the report shall show for each calendar month:

- (a) The lease be identified by inserting the name of the United States land office and the serial number, or in the case of Indian land the lease number and lessor's name, in the space provided in the upper right corner;
- (b) Each well be listed separately by number, its location be given by 40-acre subdivision (1/4 1/4 sec. or lot), section number, township, range, and meridian;
- (c) The number of days each well produced, whether oil or gas, and the number of days each input well was in operation be stated;
- (d) The quantity of oil, gas, and water produced, the total amount of gasoline, and other lease products recovered, and other required information. When oil and gas, or oil, gas, and gasoline, or other hydrocarbons are concurrently produced from the same lease, separate reports on this form should be submitted for oil and for gas and gasoline, unless otherwise authorized or directed by the supervisor.

For statutory citations, see note to 221.1.

- (e) The depth of each active or suspended well, and the name, character, and depth of each formation drilled during the month, the date each such depth was reached, the date and reason for every shut-down, the names and depths of important formation changes and contents of formations, the amount and size of any casing run since last report, the dates and results of any tests such as production, water shut-off, or gasoline content, and any other noteworthy information on operations not specifically provided for in the form.
- (f) The footnote must be completely filled out as required by the supervisor. If no runs or sales were made during the calendar month, the report must so state.
- [fol. 174] 221.61 Daily Report of Gas-Producing Wells (Form 9-352). Unless otherwise directed by the supervisor, the readings of all meters showing production of natural gas from leased lands shall be submitted daily on form 9-352, together with the meter charts. After a check has been had the meter charts will be returned.
- 221.62 Statement, of Oil and Gas Runs and Royalties (Form 9-361 Rublic; Form 9-361 A Indian). When directed by the supervisor, a monthly report shall be made by the lessee in duplicate, on form 9-361 or 9-361A, showing each run of oil, all sales of gas, gasoline, other lease products, and the royalty accruing therefrom to the lessor. When use of this form is required it must be completely filled out and sworn to.
- 221.63 Royalty and Rental Remittance (Form 9-614A Indian). Form 9-614A, completely filled out and signed, shall be submitted to the supervisor in triplicate and shall accompany each remittance covering payments of royalty or rental on Indian lands.
- 221.64 Royalty and Rental Remittance (Form 11ND). Naval Petroleum Reserves). Form 11ND, completely filled out and signed, must accompany each remittance covering payments of royalty or rental on naval petroleum reserves. The remittance and the original form shall be sent direct to the Property Accounting Officer, United States Navy,

^{*} For statutory citations, see note to 221.1.

Bureau of Supplies and Accounts, Navy Department, Washington, D. C., and the duplicate and triplicate copies of the form shall be sent to the oil and gas supervisor.

221.65 Special Forms or Reports. When special forms or reports other than those referred to in these regulations may to necessary, instructions for the filing of such forms or reports will be given by the supervisor.

221.66 Appeals. An appeal from any order issued under authority of these regulations may be filed as hereinafter set forth in this section. Compliance with any such order shall not be suspended by reason of an appeal having been taken unless such suspension is authorized in writing by the Director, or the Secretary (dependent upon the officer with whom the appeal is pending), and then only upon a determination that such suspension will not be detrimental to the lessor or upon the submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage.

- (a) An appeal to the Director may be taken from any order of the supervisor by filing such appeal with the latter officer within 20 days after service of the order. The appeal shall incorporate or be accompanied by such written showing and argument on the facts and law as the appellant may deem adequate to justify reversal or modification of the order. All statements of facts must be made under oath.
- (b) The supervisor shall transmit the appeal and accompanying papers to the Director with a full report and recommendations in the premises and that officer shall review the record and render such a decision in the case as he deems proper.
- (c) An appeal from any decision of the Director may be taken to the Secretary within 30 days after service of the Director's decision. The appeal shall be accompanied by such written showing and argument on the facts and law as appellant may deem adequate to justify reversal or modification of the decision. Any statement of facts not submitted to the Director must be made under oath.

For statutory citations, see note to 221.1..

- (d) Oral argument in any case pending before the supervisor, the Director, or the Secretary will be allowed on motion in the discretion of such officer and at a time to be fixed by him.
- [fol. 175] (e) The procedure for appeals involving leases for public land shall be followed for leases on the naval petroleum reserves and Indian land except that, with regard to the naval petroleum reserves, the Director of Naval Petroleum Reserves, and with regard to Indian land, the Commissioner of Indian Affairs will exercise the functions vested in the Director.

221.67 Effective Date of These Oil and Gas Operating Regulations, Repeal of Prior Regulations. These oil and gas operating regulations shall become effective on the first day of June, 1942, and shall supersede the oil and gas operating regulations of November 1, 1936, as amended, 1 F. R. 1996-2003, 56 L. D. 415, Title 30 C. F. R., Ch. II, Secs. 221.1-221.56, except as to leases and unit agreements in force and effect on June 1, 1942, to which these operating regulations are not applicable. #

Recommended for approval: W. C. Mendenhall, Director of the Geological Survey.

Approved: March 23, 1942. Harold L. Ickes, Secretary of the Interior.

Approved: May 23, 1942. James Forrestal, Acting Secretary of the Navy.

Approved: May 25, 1942. Franklin D. Roosevelt, President of the United States.

[•] For statutory citations, see note to 221.1.

[#] Not applicable on said effective date to lands acquired under the act known as the Appalachian Forest Act of March 1, 1911, 36 Stat. 961, to lands in national parks, to lands withdrawn or reserved for military or naval uses or purposes, except naval petroleum reserves, or to lands within the Osage Indian Reservation.

[fol. 176]

Ехнівіт "О-1."

United States Department of the Interior, Geological Survey, P. O. Box 311, Tulsa, Oklahoma

December 5, 1941.

To Lessees of Federal and Restricted Indian Lands (except Osage)—Mid-Continent District.

Use of Cement for Plugging Wells @

As a matter of general policy operators and lessees abandoning wells under supervision of the Mid-Continent District of the Geological Survey hereafter shall be required to plug off oil-bearing horizons with cement and to fill unplugged portions of the holes with mud fluid.

It has been the general practice in a large part of Oklahoma to plug and abandon wells by filling the holes with mud fluid. Heretofore the Geological Survey has accepted this method of abandonment in most cases as being satisfactory. However in a number of operations using second ary recovery methods, particularly in areas subjected to water flood, certain wells previously abandoned by the use of mud fluid alone, have started leaking oil, gas or water at the surface. In other instances difficulties encountered in repressuring a sand may be attributable to sub-surface losses occurring through old abandoned wells. In view the recognized importance of secondary recovery methods of production, the necessity of adequate and proper plugging of wells cannot be overemphasized. As the use of cement in plugging off oil-bearing formations is considered to give greater permanency it is believed that this practice should be generally followed.

In the future, notices of intention to abandon wells under supervision of the Geological Survey should provide for cementing off oil-bearing horizons. The notices should include in addition to other pertinent information, complete details with respect to the quantity of cement to be used, the well depths at which it is to be used, and the method to be employed in putting the cement into the well. Exceptions to this procedure may be granted by the District Engineer in charge of the operations, upon presentation of information by the operator which shows beyond a reasonable doubt that the particular horizon involved is

not likely to be repressured, and that a cement plug op-

posite such horizon would serve no useful purpose.

If additional copies of this letter are needed to inform field superintendents or other employees of this change in abandonment requirements, the desired number of copies will be forwarded upon request.

J. R. Reeve, Supervisor, Oil and Gas Operations.

[fol. 177]

Ехнівіт "Р-1"

February 1, 1939.

Mr. Edgar M. Pilkington, United States Geological Survey, Federal Building, Oklahoma City, Oklahoma.

Re.: Pau-Kune #6, Section 10-5N-9W, Caddo County

In line with conversation with your office this morning we enclose you herewith Form 9-331B tovering work we propose to do in the way of drilling deeper Pau-Kune #6, in Section 10-5N-9W, Caddo County, Oklahoma. It is our desire to proceed with this work with the least possible delay and would appreciate very much if you would give us authority to proceed promptly.

Yours very truly,

ENW:IR, cc: K. Bullock, Encl.

[fol. 178] %

Ехнівіт "Р-2"

(Submit in triplicate)

Form 9-3311. (February 193— Indian Agency Kiowa. Allottee Pau-Kune. Lease No. 170.

United States Department of the Interior, Geological

Sundry Notices and Reports on Wells

Notice of intention to drill-deeper X
Notice of intention to change plans
Notice of Intention to test water shut-off
Notice of intention to redrill or Repair well
Notice of intention to shoot or acidize

Notice of intention to pull or Alter casing
Notice of Intention to abandon well
Subsequent report of water shut off
Subsequent report of shooting or Acidizing
Subsequent report of altering casing
Subsequent Report of Redrilling or repair
Subsequent Report of abandonment
Supplementary well history

(Indicate above by check mark nature of report, notice, or other data)

Oklahoma City, February 1, 1939.

Well No. 6 is located 990 ft. from N line and 330 ft. from E line of sec. 10 SE NE NE Sec. 10 (14 Sec. and Sec. No.) 5N (Twp.) 9W (Range) (Meridian) Cement (Field) Caddo (County or Subdivision) Oklahoma (State of Territory). The elevation of the derrick floor above sea level is — 10.

Details of Work

State names of and expected depths to objective sands; show sizes, weights, and lengths of proposed casings; indicate muddling jobs, cementing points, and all other important proposed work)

The present total depth of the well is 2400° and has 2226° 8½" casing cemented, and 209° of 65%" inserted liner. Our intentions are to pull the liner and drill with intary 77%" hole to the howe sand with top of sand approximately 3350°, set 7" casing and cement same to bottom of 8". Drilling in with rotary.

I understand that this plan of work must receive approval in writing by the Geological Survey before operations may be commenced.

Company Magnolia Petroleum Company. Address Box 1828, Oklahoma City, Oklahoma. By — Title Division Superintendent.

U. S. Government Printing Office 6-7053-b

[fol 179]

Ехнівіт "p-3"

United States
Department of the Interior

Geological Survey

303 Federal Building Oklahoma City, Oklahoma February 3, 1939

Pau-Kune, Sec. 10-5N-9W

Magnolia Petroleum Company Box 1828 Oklahoma City, Oklahoma

GENTLEMEN:

Receipt is acknowledged of your "Notice of Intention to deepen" dated February 1, 1939, covering well No. 6 on the subject land in SE NE NE sec. 10, T. 5N, R. 9W. You outline details of proposed work as follows:

The present total depth of the well is 2400' and has 2226' of 8\(^4\)" casing cemented, and 209' of 6\(^5\)\s" inserted liner. Our intentions are to pull the liner and drill with rotary 7\(^8\)" hole to the Rowe sand with top of sand approximately 3350', set 7" casing and cement same to bottom of 8". Drilling in with rotary.

Your proposed work is hereby approved subject to compliance with the provisions of Section 2 of the "Oil and Gas Operating Regulations", revised November 1, 1936, copy of which will be sent you on request.

Operations on this well will be under the supervision of Mr. E. M. Pilkinton, box 976 Oklahoma City, Oklahoma, telephone 2-1682.

Records and written notices relating to these well operations must be submitted to this office in accordance with Section 5 of said operating regulations. Any proposed change of detail of the work outlined above must be submitted to this office on Form 9-331b, in Triplicate, and approval obtained before such work is commenced.

Very truly yours, (Signed) W. R. Cummings, Acting Supervisor, Oil and Gas Operations.

[fol. 180]

EXHIBIT "R-9"

Form 9-3311 (February 193-

(Submit in triplicate)

United States
Department of the Interior

Geological Survey

Indian Agency Kiowa Anadarko, Oklahoma Allottee Pau Kune. Lease No. 170

Sundry Notices and Reports on Wells

Notice of intention to change plans.
Notice of Intention to test water shut-off.
Notice of intention to redrill or Repair well.
Notice of intention to shoot or acidize.
Notice of intention to pull or Alter casing.
Notice of Intention to abandon well. X.
Subsequent report of water shut-off
Subsequent report of shooting or Acidizing.
Subsequent report of altering casing.
Subsequent Report of Redrilling or repair.
Subsequent Report of abandonment.
Supplementary well history.

(Indicate above by check mark nature of report, notice, or other data).

Oklahoma City, Okla., June 26, 1939

Well No. 4 is located 200 ft. from N line and 1120 ft. from E line of sec. 10 Section 10 (1/4 Sec. and Sec. No.), 5N (Twp.), 9W (Range), Indian, (Meridian), Cement (Field), Caddo (County or Subdivision), Oklahoma (State or Territory).

The elevation of the derrick floor above sea level is - ft

Details of Work

(State names of and expected depths to objective sands; show sizes, weights, and lengths of proposed casings; indicate muddling jobs, cementing points, and all other important proposed work.)

This well was drilled and completed in July 1922, T.D. 2424'; 8½" casing cemented w/80 sacks at 2246', ran 150' 65%" liner and 110' of 5-3/16" liner. Initial production 30 bbls. It now produces a maximum of 1 barrel of oil per day and no prospects to improve it. Since it is an off location offset obligations will not permit drilling deeper and instead a new well will be drilled. It is our intention to pull 5-3/16" and 65%" liner, shoot off 8½" casing, filling hole with heavy rotary mud as liner and casing is pulled. Work to be done under supervision of Department supervisor and in accordance with regulations.

I understand that this plan of work must receive approval in writing by the Geological Survey before operations may

be commenced.

Company: Magnolia Petroleum Company. Address: Box 1828, Oklahoma City, Okla.

By — , (Title) Division Superintendent. U. S. Government Printing Office 6-7053-b.

[fol. 181]

EXHIBIT "P-10"

United States
Department of the Interior

Geological Survey

303 Federal Building Oklahoma City, Oklahoma

June 30, 1939

Pau-Kune, Apache 951-Lease 170, N½ NE, 10-5N-9W Well No. 4 (NW NE NE.)

Magnolia Petroleum Company P. O. Box 1828 Oklahoma City, Oklahoma

GENTLEMEN:

Receipt is acknowledged of your "Notice of Intention to Abandon" dated June 26, 1939, covering well No. 4, on the subject land in NW NE NE, Sec. 10, T 5N, R 9W. You outline details of proposed work as follows:

This well was drilled and completed in July 1922, T.D. 2424'; 81/4" casing cemented w/80 sacks at 2246°; ran 150' 65%" liner and 110' of 5-3/16" liner. Initial production 30

bbls. It now produces a maximum of 1 barrel of oil per day and no prospects to improve it. Since it is an off location, offset obligations will not permit drilling deeper and instead, a new well will be drilled. It is our intention to pull 5-3/15" and 6%" liner, shoot off 91/4" casing, filling hole with heavy rotary mud as liner and casing are pulled. Work is to be done under supervision of Department Supervisor and in accordance with Regulations.

Well No. 4 is located 200 ft. from North line and 1120 ft. from East line of NE1/4 of Sec. 10-5N-9W, (NW NE NE).

Your prop-sed work is hereby approved subject to compliance with the provisions of Section 2 of the "Oil and Gas Operating Regulations", revised November 1, 1936, copy of which will be sent you on request.

As heavy rotary mud is to be used in mudding, mud must be kept up in the casing at all times. Please notify this office in advance of actual plugging work in order that an engineer from this office may have the opportunity to be present and supervise and witness abandonment work.

Records and written notices relating to these well operations must be submitted to this office in accordance with Section 5 of said operating regulations. Any proposed change of detail of the work outlined above must be submitted to this office on Form 9-331b, in Triplicate, and approval obtained before such work is commenced.

Very truly yours, (Signed) Edgar M. Pilkinton

District Engineer.

EMP:MCB.

cc-Kiowa Indian Agency, Tul. 1 Office, USGS.

[fol. 182]

Ехнівіт "Р-11"

Form 9-3311 (February 193-

(Submit in triplicate)

United States
Department of the Interior

Geological Survey

Indian Agency Kiowa, Anadarko, Oklahoma, Allottee Pau Kune, Lease No. 170

Sundry Notices and Reports on Wells

Notice of intention to drill. X Notice of intention to change plans. Notice of Intention to test water shut-off.
Notice of intention to redrill or Repair well.
Notice of intention to shoot or acidize.
Notice of intention to pull or Alter casing.
Notice of Intention to abandon well.
Subsequent report of water shut-off.
Subsequent report of shooting or Acidizing.
Subsequent report of altering casing.
Subsequent Report of Redrilling or repair.
Subsequent Report of abandonment.
Supplementary well history.

(Indicate above by check mark nature of report, notice, or other data)

Oklahoma City; Okla., June 26, 1939

Well No. 9 is located 330 ft. from N line and 990 ft. from E line of sec. 10 NW NE NE 10 (14 Sec. and Sec. No.), 5N (Twp.), 9W (Range), Indian (Meridian), Cement (Field), Caddo (County or Subdivision), Oklahoma (State or Territory.

The elevation of the derrick floor above sea level is _ft.

Details of Work

(State names of and expected depths to objective sands; show sizes, weights, and lengths of proposed casings; indicate muddling jobs, cementing points, and all other important

portant proposed work.)

It is our intention to drill Pau Kune No. 9 in the above location to an approximate Total Depth of 3400'. Will set 13" at approximately 280', cement g with 800 sacks. Drill 9" hole with Rotary Tools and set 7" at approximately 3325' and cement w/1000 sacks cement. Expect to find top of sand around 3335' and Total Depth of well will be dependent upon sand encountered. Well will be drilled in with Rotary coring ahead.

I understand that this plan of work must receive approval in writing by the Geological Survey before operations may

be commenced.

Company: Magnolia Petroleum Company.

Address: Box 1828 Oklahoma City, Oklahoma.

By —, (Title) Division Superintendent U. S. Government Printing Office 6-7053-b [fol. 183]

Ехнівіт "P-12"

United States Department of the Interior

Geological Survey

302 Federal Building, Oklahoma City, Oklahoma June 30, 1939.

Pau-Kune, Apache 951—Lease 170, N½ NE, 10-5N-9W Well No. 9 (NW NE NE)

Magnolia Petroleum Company, P. O. Box 1828, Oklahoma City, Oklahoma.

GENTLEMEN:

Receipt is acknowledged of your "Notice of Intention to Drill" dated June 26, 1939, covering well No. 9, on the subject land in NW NE NE, Sec. 10 T5N, R9W. You outline details of proposed work as follows:

It is our intention to drill Pau-Kune # 9 in the above location to an approximate Total Depth of 3400. Will set 13" at approximately 280, cementing with 300 sacks. Drill 9" hole with Rotary Tools and set 7" at approximately 3325' and cement with 1000 sacks cement. Expect to find top of sand around 3335' and total depth of well will be dependent upon sand encountered. Well will be drilled in with Rotary coring ahead.

Well No. 9 is located 330 ft, from North line and 990 ft. from East-line of NE1/4 of Sec. 10-5N-9W, (NW NE NE).

Your proposed work is hereby approved subject to compliance with the provisions of Section 2 of the "Oil and Gas Operating Regulations", revised November 1, 1936, copy of which will be sent you on request.

Records and written notices relating to these well operations must be submitted to this office in accordance with Section 5 of said operating regulations. Any proposed change of detail of the work outlined above must be submitted to this office on Form 9-331b, in Triplicate, and approval obtained before such work is commenced.

Very truly yours, (Signed) Edgar M. Pilkinton,

District Engineer

EMP: MCB.

cc-Kiowa Indian Agency, Tulsa Office, USGS.

[fol. 184]

Ехнівіт "Р-14"

Form 9-3311 (February 193-)

(Submit in triplicate)

United States Department of the Interior Geological Survey

Indian Agency Kiowa, Allottee Pau Kune, Lease No. 170

Sundry Notices and Reports on Wells

Notice of intention to drill deeper.

Notice of intention to change plans.

Notice of Intention to test water shut-off.

Notice of intention to redrill or Repair well.

Notice of intention to shoot or acidize.

Notice of intention to pull or Alter casing.

Notice of Intention to Abandon well.

Subsequent report of water shut-off.

Subsequent report of shooting or Acidizing.

Subsequent report of altering casing.

Subsequent Report of Redrilling or repair.

Subsequent Report of abandonment. X.

Supplementary well history.

(Indicate above by check mark nature of report, notice, or other data.)

7-24, 19-

Well No. 4 is located 200 ft. from N line and 1120 ft. from E line of sec. 10 NW NE NE (1/4 Sec. and Sec. No.), 5 (Twp.), 9W (Range), Indian (Meridian), Cement (Field), Caddo (County or Subdivision), Oklahoma (State or Territory).

The elevation of the derrick floor above sea level is - ft

Details of Work

(State names of and expected depths to objective sands; show sizes, weights, and lengths of proposed casings; indicate muddling jobs, cementing points and all other important proposed work.)

Steel liner run to 2424'. No obstructions hole filled with rotary mud to top, mud introduced into hole with pump. Top of hole left open for refilling when mud settles. No

plugs were used. $8\frac{1}{4}$ " casing pulled out of hole 871'; $8\frac{1}{4}$ " casing left in hole 1375'; $6\frac{5}{8}$ " liner left in hole 150'; 5-3/16" liner left in hole 110'.

I understand that this plan of work must receive approval in writing by the Geological Survey before operations may

be commenced.

Company: Magnolia Petroleum Company.

Address: Box 900, Dallas, Joe Givens, S. S. Young.

By J. C. Shaw, (Title) Dist. Supt.

U. S. Government-Printing Office 6-7053-b

[fof. 185]

Ехнівіт "Р-21"

Form 9-3311 (February 193-)

(Submit in triplicate)

United States Department of the Interior, Geological Survey, Indian Agency Kiowa

Allottee Pau-Kune, Lease No. 170

Sundry Notices and Reports on Wells

Notice of intention to drill deeper. X
Notice of intention to change plans.
Notice of Intention to test water shut-off.
Notice of intention to redrill or Repair well.
Notice of intention to shoot or acidize.
Notice of intention to pull or Alter casing.
Notice of Intention to abandon well.
Subsequent report of water shut-off.
Subsequent report of shooting or Acidizing.
Subsequent Report of altering casing.
Subsequent Report of Redrilling or repair.
Subsequent Report of abandonment.
Supplementary well history.

(Indicate above by check mark nature of report, notice, or other data.)

Oklahoma City, Okla., October 3, 1939.

Well No. 7 is located 360 ft. from S line and 200 ft. from W line of sec. 10 SW NE NE (1/4 Sec. and Sec. No.).

5N (Twp.). 9W (Range). — (Meridian). Cement (Field). Caddo (County or Subdivision). Oklahoma (State or Territory).

The elevation of the derrick floor above sea level is - ft.

Details of Work

(State names of and expected depths to objective sands; show sizes, weights, and lengths of proposed casings; indicate muddling jobs, cementing points, and all other im-

portant proposed work.)

This well is now producing 2 barrels of oil and 2 barrels of water per day from shallow sands bottomed at 2437'. It is desired to deepen to the Bigley Sand for the purpose of developing profitable production if possible. 85%" OD casing is cemented at 2125'. Hole has 380' of 10" liner extending from 2057' to bottom. We expect to pull the 65%" liner, deepen with a rotary outfit, cement 7" OD casing at approximately 3350' with 750 sacks cement, to drill plug with a rotary and wash or swab out rotary mud as heretofore on wells deepened in this area.

Well to be drilled to approximately 3375'.

I understand that this plan of work must receive approval in writing by the Geological Survey before operations may be commenced.

Company, Magnolia Petroleum Company, Address, Box 1828, Oklahoma City, Oklahoma, by A. H. Proctor, Title, Division Superintendent.

U. S. Government Printing Office 6-7053-b.

[fol. 186]

Ехнівіт "Р-22"

United States Department of the Interior,
Geological Survey,
Of Federal Building Oklahoma City, Oklahoma

302 Federal Building, Oklahoma City, Oklahoma

October 5, 1939.

Pau-Kune. Apache 951—Lease 170. N½ NE, 10-5N-9W. Well No. 7 (SW NE NE)

Magnolia Petroleum Company, P. O. Box 1828, Oklahoma City, Oklahoma.

GENTLEMEN:

Receipt is acknowledged of your "Notice of Intention to Drill Deeper" dated Oct. 3, 1939, covering well No. 7, on the

subject land in SW NE NE, Sec. 10 T5N, R9W. You out-

line details of proposed work as follows:

This well is now producing 2 barrels of oil and 2 barrels of water per day from shallow sands bottomed at 2437. It is desired to deepen to the Bigley Sand for the purpose of developing profitable production if possible. 85% OD casing is cemented at 2125′. Hole has 380′ of 10″ liner extending from 2057′ to bottom. We expect to pull the 65% liner, deepen with a rotary outfit, cement 7″ OD casing at approximately 3350′ with 750 sacks cement, to drill plug with a rotary and wash or swab out rotary mud as heretofore on wells deepened in this area.

Well No. 7 is located 990 ft, from North line and 1120 ft. from East line of NE1/4 of Sec. 10-5N-9W (SW NE NE).

Your proposed work is hereby approved subject to compliance with the provisions of Section 2 of the "oil and Gas Operating Regulations", revised November 1, 1936, copy of which will be sent to the second section 2 of the "oil and Gas Operating Regulations", revised November 1, 1936, copy of

which will be sent you on request.

Records and written notices relating to these well operations must be submitted to this office in accordance with Section 5 of said operating regulations. Any proposed change of detail of the work outlined above must be submitted to this office on Form 9-331b, in Triplicate, and approval obtained before such work is commenced.

Very truly yours, (Signed) Edgar M. Pilkinton, Dis-

trict Engineer.

EMP:MCB.

cc-Kiowa Indian Agency.

Tulsa Office USGS.

(Here follows 1 Photolithograph side folio 187)

DEPARTMENT OF THE INTERIOR GROOTCAL SURVEY IN CONTRING OF HOMA MYPARIA OUADRUPTICS OF HOMA MYPARIA O	OFFICE OF HOUMA AFFAIRS QUADRUPTIO AT BECORD NOTE — The log must be exholiteful a Beneatory to the Superintellinis or his Annual Line of the Superintellinis of t	1	EXHIBIT "P-24"	P
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If so state kind, depth set, and results obtained	bettern hele place treed?			
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Vere bottom bole plugs used 7			If so, state kind, depth set, and results obtained	

gas thru 2g Tubg. 8.1. Tubing pressure 2500 EMPLOYEES John H. Tidwell Albert Allen

Russians: This was drilling deeper jeb. Piret flow made 11-5-89, Plored 118 B in 6 Hrs. with

J. C. SHAW Dist. Bupt. Agent's Title

The summary of this page is for the condition of the well at above date and constitutes a complete and correct record of all work done thereon.

FORMATION RECORD

PORMATION	TOP	воттом	PORMATION	TOP	BOTTOM
			Sand Show oil in the Permian	3594	8406
ale & Shells	2487	2612	1	8405	8410
	2512	2585	Shale	8410	3424
ndy IAmo	2686	2680	Sandy Lime - Shew Oll		0868
ale & Shells	2550	2500	Top Basal Permian lime at 54		-400
eken Idne & Shale	2580	2505	Bigley Sand - Base at 3427	8424	3427
oken Lime & Band	2595	2610	Lime-Cored	3427	3487
ale & Shells	2610	2690	Gray Shale - cored	3487	3447
ale	2690	2706	Idme & Gray Shale - eared	3447.	8457
dte fend	g' 8706	2712	Gray Sandy Shale - ocred	3467	3469
10	2712	2779			
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ndy Line	2865	2980 .			Mary Comme
ale & Shells	2980	3076			
me à Shale	3076	8117			
ale & Send	8117	8178			
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and - light show oil	8265	8275			6 45
ale & Idme	3276	8298			
10	3298	3825			7
me & Shale	5325	3845		1	
ble-Olsen Sand - Show Of	1/ 2-	8870			
ale	8370	3394			1 4



[fol. 188]

Ехнівіт "Р-26"

United States Department of the Interior, Geological Survey,

P. O. Box 976, Oklahoma City, Oklahoma

November 22, 1940.

Apache 951-Lease 170-E. N1/2 NE, 10-5N-9W Pau-Kune. Well No. 2 (C N1/2 N1/2 NW NE)

Magnolia Petroleum Company, P. O. Box 1828, Oklahoma City, Oklahoma.

GENTLEMEN:

Receipt is acknowledged of your "Notice of Intention to Deepen and Test" dated Nov. 19, 1940, covering well No. 2, on the subject land in C N1/2 N1/2 NW NE, Sec. 10, T5N, R9W. You outline details of proposed work as follows:

This well was drilled to a total depth of 2416' in 1921 and completed for an estimated 200 barrel daily capacity in Cement sand, approximately 2407' to 2414'. The well has declined in production to 3 barrels daily. Due to Bigley. sand production offsetting this well to north, it is desired to drill deeper Pau-Kune #2 to test this sand to be found approximately 3350'. 81/4"-2203' with 100 sacks of cement in 1921. We expect to pull 260' of 65%" liner now in well and run and cement 7" OD; casing on top of sand with 500 sacks cement. Hole will be drilled with rotary. Well No. 2 is located 200 ft. from N. line and 660 ft. from W. line of ·NE1/4, or C N1/2 N1/2 NW NE, 10-5N-9W.

Your proposed work is hereby approved subject to compliance with the provisions of Section 2 of the "Oil and Gas Operating Regulations revised November 1, 1936, copy

of which will be sent you on request.

Records and written notices relating to these well operations must be submitted to this office in accordance with Section 5 of said operating regulations. Any proposed change of detail of the work outlined above must be submitted to this office on Form 9-331b, in Triplicate, and approval obtained before such work is commenced.

Very truly yours, (Signed) Edgar M. Pilkinton, Dis-

trict Engineer.

EMP: MCB. cc-Kiowa Indian Agency. Tulsa Office USGS.

[fol. 189]

Ехнівіт "P-31"

United States Department of the Interior, Geological Survey, P. O. Box 976, Oklahoma City 1, Okla.

April 29, 1944.

Pau-Kane. Apache 951—Lease 170-E. Well No. 11-SW NE NE. 10-5N-9W

Magnolia Petroleum Company, P. O. Box 1828, Oklahoma City 1, Oklahoma

GENTLEMEN:

Receipt is acknowledged of your Notice of Intention dated April 28, 1944, to Drill & Test well No. 11 on the subject land in SW NW NE being 330 ft. from (S) line & 330 Ft. from (W) line of

NW NE 10 5N 9 W Indian Cement $\binom{1}{4}$ (Sec.) (T) (R) (Mer.) (Field)

The proposed work as stated on said notice is hereby approved subject to compliance with the provisions of the applicable Oil and Gas Operating Regulations and subject to the additional conditions as follows:

- 1. The regular log (in triplicate) must include descriptions of any cores taken and all available geologic data. A special log (in duplicate) shall be files of any electrical or other survey made of this well.
- 2. Operations on this well will be under the supervision of the Oklahoma City Office of the Geological Survey, telephone 2-1682, Box 276, Oklahoma City 1, Oklahoma. You are requested to notify the District Engineer of the date on which drilling operations are commenced.

Particular attention is directed to the requirements for lessees provided in Sections 221.18 to 221.56, inclusive, of the Operating Regulations. Generally, records and written notices relating to well operations must be submitted in accordance with Sections 221.57 to 221.59, inclusive, of said Regulations. No change in the proposed operations as herein approved will be permitted unless acceptable notice of intention to change plans is submitted on Form 9-331b,

in Triplicate, and approval obtained before such work is commenced.

Very truly yours, (Signed) John A. Anderson, District Engineer.

JAA:mcb.

cc-Kiowa Indian Agency.

Tulsa Office USGS.

[fol. 190]

Ехнівіт "Q-1"

United States Department of the Interior,

Office of Indian Affairs, Field Service

Shawnee Indian Agency, Shawnee, Qklahoma, November 19, 1940.

Magnolia Petroleum Corp., Dallas, Texas.

GENTLEMEN:

This will refer to your oil and gas lease on the west 3/4 of the W/2 W/2 SE/4 of 13-7-4, now owned by Nicholas Vieux, being the allotment of Madeline Bourbonnais, deceased Pott. No. 616.

Some time ago an animal belonging to Mr. Vieux fell into the slush pit located just south of the producing well and at that time an employee of your company promised to construct a fence around this pit; however, nothing has been done.

Since Mr. Vieux has stock running at large around this location, it is believed he is not asking too much to have the pit enclosed; therefore, may I request that the matter be given due attention.

Respectfully, (Signed) A. C. Hector, Superintendent.

ODL/nmc.

006.

#616. S. & F.

[fol. 191]

Ехнівіт "Q-6"

United States Department of the Interior

Geological Survey

302 Federal Building, Oklahoma City, Oklahoma
June 27, 1936.

Nicholas Vieux, W3/4 W1/2 W1/2 SE, 13-7N-4E

Magnolia Petroleum Company, Box 1828, Oklahoma City, Oklahoma.

GENTLEMEN:

We have received your letter of June 26, 1936, transmitting supplemental well record reports covering the plugging back and acidizing of the Sompson Dolomite and duplicate notices of intention to plug back, rip casing and acidize the Hunton Line.

This will confirm my telephone conversation with Mr. Chandler, at which time he was granted oral permission to plug back, rip, and acidize the Hunton Lime. Mr. Chandler stated that you wished to plug back temporarily with mud and acidize the Hunton to determine if production would be commercial. However, in the event production is in commercial quantities, the hole must be plugged back with cement instead of mud.

We are enclosing a supply of "Supplemental Well Record" forms for your convenience. Duplicate reports must be filed with this office within 15 days after the completion of the plugging back and acidization of the well.

Please inform us if and when it will be necessary to replace this mud plug between the Dolomite and the Hunton with cement.

Yours very truly, Supervisor, Oil and Gas Operations, by (Signed) Edgar M. Pilkington, Associate Petroleum Engineer.

EMP:MCB.

Enclosures.

cc-Shawnee Indian Agency.

[fol. 192]

Ехнівіт "R-2"

United States Department of the Interior

Geological Survey

302 Federal Building, Oklahoma City, Oklahoma

July 2, 1936.

Angeline Nona, Pott. 120, NW, 11-7N-4E

Magnolia Petroleum Company, Box 1828, Oklahoma City, Oklahoma.

GENTLEMEN:

We have just received your letter of July 1, 1936, transmitting duplicate notices of intention to deepen and to acidize well No. 1 on the subject lease.

You are hereby granted permission to deepen and to

acidize this well in the Hunton Lime.

Enclosed is a supply of "Supplemental Well Record" forms for your convenience.

Very truly yours, Supervisor, Oil & Gas Operations, by (Signed) Edgar M. Pilkington, Associate

Petroleum Engineer.

EMP:MCB.

Enclosure.

cc-Shawnee Indian Agency.

[fol. 193]

Ехнівіт "К-4"

(Map Plat)

Department of the Interior, Office of Indian Affairs in Cooperation with the Geological Survey Supplemental Well Record

Note—This Supplemental well record of the deepening, plugging back, altering of casing, etc., done on the well since the previous record was filed must be submitted in Duplicate to the Superintendent or his agent not later than 15 days after work is completed as provided in Section 18 of Operating Regulations approved July 7, 1925.

Company operating: Magnolia Petroleum Company. Office address: Box 900, Dallas, Texas. Lessor: Joseph Nona.

Well No. 1, Sec. 11, Twp. 7N, Rge. 4E. County: Pottawatomie. Located in SE¹/₄ NW¹/₄ 330 Ft. N of South line and 330 Ft. W of East line. Date previous record filed July 8, 1936. Original depth last reported 4095, 19—. Reason for doing work: Acidizing well. Present total depth 4095. Commenced work July 10th, 1936. Completed work July 10th, 1936.

List below all work done on well, such as redrilling, deepening record, alteration of casing in well, type of plugs used in plugging back, shooting record, and preparation of well for repressuring an area, etc. Give results of operation.

Acidized July 10, 1936, with 1000 Gallons Acid under load of 216 Bbls. of oil, through 2" Tubing. Well took 10 Points Vacuum. Production before acidizing, pumped 3 Bbls. oil. Production after Acidizing, pumped 3 Bbls. oil. Have not recovered oil load.

Signed: Wm. Hoskinson.

Date July 17, 1936.

Address of Agent: Box 77, Saint Louis, Okla. Agent's title: Sup't for Magnolia Petroleum Co.

This page is for the condition of the well at above date and constitutes a complete and correct record of all work done thereon. Additional information may be placed on reverse side.

-U. S. Government Office 1930. 6-8024.

United States Department of the Interior Geological Survey

411 Federal Building, Oklahoma Cify, Oklahoma February 9, 1942.

Angeline Nona, decd., Pott. 120—Lease #10793, NW, 11-7N-4E, Well No. 3 (C NE NW)

Magnolia Petroleum Company, P. O. Box 1828, Oklahoma City, Oklahoma.

GENTLEMEN:

Receipt is acknowledged of your "Notice of Intention to Drill & Test" dated Feb. 6, 1942, covering well No. 3, on the subject land in C NE NW, Sec. 11, T. 7N, R. 4E. You outline details of proposed work as follows:

We are desirous of drilling a well on the Joseph Nonalease located as above and to begin same as early as possible to do so. This well is to be drilled with rotary tools to the Hunton lime at approximately 3950 feet. We will set and cement approximately 80 feet of 10¾" surface pipe, and set string of 7" casing on top of the Hunton lime, cementing same with 250 sacks of cement. The well will be drilled in with Standard Tools and acidized with 3000 gallons of acid. This spacing conforms to Federal Regulations "M-68" and all work will be performed in accordance with the Department's regulations.

We respectfully request the authority to proceed with the work.

"Well No. 3 is located 660 ft. from North line and 660 ft. from East line of NW, 11:-7N-4E (C NE NW)."

Your proposed work is hereby approved subject to compliance with the provisions of Section 2 of the "Oil and Gas Operating Regulations", revised November 1, 1936, copy of which will be sent you on request.

If electrical or other survey is made, duplicate log of the special survey must be furnished in addition to regular ge-logic log in triplicate. This approval is granted subject to the condition that drilling operations so authorized shall

be in conformity with the terms and conditions of OPM Order M-68, or any modification or amendment thereof

that hereafter may be issued.

Records and written notices relating to these well operations must be submitted to this office in accordance with Section 5 of said operating regulations. Any proposed change of detail of the work outlined above must be submitted to this office on Form 9-331b, in Triplicate, and approval obtained before such work is commenced.

Very truly yours, (Signed) Edgar M. Pilkington,

District Engineer.

EMP:MCB.

cc—Shawnee Indian Agency. Tulsa Office USGS.

[fol. 195] United States Department of the Interior Geological Survey

August 23, 1938.

Lease or Permit No., or/Name of Allottee. Frank Davis, Pott. 809—Lease 10480 N1/4 NE, 15-7N-4E

Magnolia Petroleum Company, P. O. Box 1828, Oklahoma City, Oklahoma.

GENTLEMEN:

Receipt is acknowledged of your "Notice of Intention to Plug Back, Perf., & Test" dated Aug. 22, 1938, covering well No. 3 on the subject land in NW NE NE, Sec. 15 T. 7N, R. 4E. You outline details of proposed work as follows:

"We propose to plug back this well to the Calvin Sand, as follows: Original total depth was 4157' in the Simpson with hole full of water, water was plugged off to total depth 4127', well was acidized and completed for 40 barrels per day in April 1935. We now propose to cement off the bottom, then cement top of 5-3/16" liner, which is set at 3712'; or 41 ft. up in the 7" casing—fill up with mud to approximately 3100', and cement on top at this point. We plan to perforate the 7" casing around 3150' to test the Calvin Sand. It production is found in Calvin, the hole will be in shape to produce, if not and we should wish to

do so, we could drill out the cement and resume pumping from the Simpson by using the cement squeeze job on the perforation." "Well No. 3 is located 330" from N. line and 990" from E. line of NE, sec. 15-7N-4E."

Your proposed work is hereby approved subject to compliance with the provisions of Section 2 of the "Oil and Gas Operating Regulations", revised November 1, 1936, copy

of which will be sent you on request.

Records and written notices relating to these well operations must be submitted to this office in accordance with Section 5 of said operating regulations. Any proposed change of detail of the work outlined above must be submitted to this office on Form 9-331b, in triplicate, and approval obtained before such work is commenced.

Very truly yours, (signed) Edgar M. Pilkington,

Act. District Engineer.

EMP:MCB.

cc-Shawnee Indian Agendy.

Tulsa Office (USGS).

[fol. 196]

Ехнівіт "S-13"

United States Department of the Interior Geological Survey

Box 976, Oklahoma City 1, Oklahoma

June 21, 1945.

Frank Davis. Pott. 809—Lease 10480. Well No. 1, SE NE N., 15-7N-4E

Magnolia Petroleum Company, P. O. Box 1828, Oklahoma City, 1, Oklahoma.

GENTLEMEN;

Receipt is acknowledged of your Notice of Intention dated May 18, 1945 to Plug-Back & Test Hunton Lime Well No. 1 on the subject land in SE NE NE being 990 ft. from (N) (M) line & 330 ft. from (E) (M) line of NE¼ (¼), 15 (Sec.), 7N (T.), 4E (R.), Indian (Mer.), St. Louis (Field). The proposed work as stated on said notice is hereby

approved subject to compliance with the provisions of the applicable Oil and Gas Operating Regulations and subject to the additional conditions as follows:

Your proposal is approved as to plugging-back and testing the Hunton only. If the Hunton proves non-productive, please notify this office before commencing abandonment

work.

A subsequent report of the work done and the results obtained should be submitted upon plugging-back and testing. A proposal to abandon may be included in applicable.

Please notify this office when the work is to be started in order that a representative may be present if circumstances

permit.

Particular attention is directed to the requirements for lessees provided in Sections 221.18 to 221.56, inclusive, of the Operating Regulations. Generally, records and written notices relating to well operations must be submitted in accordance with Sections 221.57 to 221.59, inclusive, of said Regulations. No change in the proposed operations as herein approved will be permitted unless acceptable notice of intention to change plans is submitted on Form 9-331b, in Triplicate, and approval obtained before such work is commenced.

Very truly yours, (Signed) John A. Anderson,

Deputy Supervisor.

JAA:mcb.

[fol. 197]

Ехнівіт "S-16"

United States Department of the Interior Geological Survey

Box 976, Oklahoma City 1, Okla.

Frank Davis, Pott. 809—Lease 10480. Well No. 1, SE NE NE, 15-7N-4E.

Magnolia Petroleum Co., P. O. Box 1828, Oklahoma City 1, Okla.

GENTLEMEN:

Receipt is acknowledged of your Notice of Intention dated Dec. 26, 1945 to Abandon Well No. 1 on the subject land in SE NE NE being 990 ft. from (N) (M) line & 330 ft. from (E) (M) line of NE¼, (¼) 15 (Sec.), 7N (T), NE (R) Indian (Mer.), St. Louis (Field). The proposed work as stated on said notice is hereby approved subject to compliance with the provisions of the applicable Oil and Gas Operating Regulations and subject to the additional conditions as follows:

Fill hole with heavy mud as casing strings are pulled. No cement is to be placed in the well at the surface until the mud column has settled and any necessary additional mud has been added. Please notify this office when abandonment work will be started so that we may have a representative present if circumstances permit.

A subsequent report of abandonment must be submitted

in triplicate upon completion of the work.

Particular attention is directed to the requirements for lessees provided in Sections 221.18 to 221.56, inclusive, of the Operating Regulations. Generally, records and written notices relating to well operations must be submitted in accordance with Sections 221.57 to 221.59, inclusive, of said Regulations. No change in the proposed operations as herein approved will be permitted unless acceptable notice of intention to change plans is submitted on Form 9-331b, in Triplicate, and approval obtained before such work is commenced.

Very truly yours, (Signed) John A. Anderson, Deputy Supervisor.

JJA:mcb.

cc-Shawnee Indian Agency, Tulsa Office USGS.

[fol. 198]·

Ехнівіт "S-18".

United States Department of the Interior Geological Survey

Box 976, Oklahoma City 1, Okla.

Frank Davis, Pott 809—Lease 10480, Well No. 2, NE NE NE, 15-7N-4E.

Magnolia Petroleum Co., P. O. Box 1828, Oklahoma City 1, Okla.

GENTLEMEN:

Receipt is acknowledged of your Notice of Intention dated Jan. 9, 1946 to Abandon well No. 2 on the subject land in NE NE NE being 330 fe from (N) (X) line & 330 ft. from (E) (X) line of NE (1/4), 15 (Sed.), 7N 4E (R.), Indian (Mer.), St. Louis (Field.).

The proposed work as stated on said notice is hereby approved subject to compliance with the provisions of the applicable Oil and Gas Operating Regulations and subject to the additional conditions as follows:

Fill hole with heavy mud to the point at which the 81/4-inch casing is to be parted. Fill the remainder of the hole with heavy mud as the casing is pulled. No cement plug is to be placed in the well at the surface until the mud column has settled and any necessary additional mud added.

Please notify this office of the date on which plugging operations will be started in order that we may have a representative present if circumstances permit.

Particular attention is directed to the requirements for lessees provided in Sections 221.18 to 221.46, inclusive, of the Operating Regulations. Generally, records and written notices relating to well operations must be submitted in accordance with Sections 221.57 to 221.59, inclusive, or said Regulations. No change in the proposed operations as herein approved will be permitted unless acceptable notice of intention to change plans is submitted on Form 9-331b, in Triplicate, and approval obtained before such work is commenced.

Very truly yours, (Signed), John A. Anderson, Deputy Supervisor. T. L. C.

JJA:b. cc-Kiowa Indian Agency, Tulsa Office USGS. Ехнівіт Т-4

United States Department of the Interior Geological Survey

302 Federal Building, Oklahoma City, Oklahoma

March 8, 1940.

KLA-DA-ING. Apache 942—Lease 171F, N½ NW SW, 3-5N-9W. Well No. 2 (NE NW SW).

Magnolia Petroleum Co., P. O. Box 1828, Oklahoma City 1, Okla.

Attention: Mr. A. H. Proctor

GENTLEMEN:

Reference is made to your letter of March 5, 1940, transmitting "Notice of Intention to Drill" well No. 2 on the subject lease.

The "Notice" was unsigned and it is being returned herewith for signatures. Please add to your "Notice" the size and amount of surface casing and amount of cement expected to be used. State if drilling-in will be done with cable tools. To simplify notices, it is suggested that water shut-off and shoot, acidize, or perforate be added to the drilling notice by the appropriate mark in the box provided at the top of the blue form, as indicated.

Your proposed location, 2152 feet from South line and 1130 feet from West line of SW¹/₄ of Section 3, puts the well on that portion of right of way conveyed to the Frisco Railway by Indian deed, which was approved by the Department on March 22, 1930. You state that the Frisco Agent at Cement advised your representative that he had instructions to not permit any starting of operations on this part of the tract. For the reason that there is a probably controversy imminent respecting the title and jurisdiction of the railroad right of way across this allotment, it would, no doubt, be advisable to move your proposed location to a point off this right of way. When you have selected the most advisable spot, please furnish in quintuplicate your justification for same, including geological data with cross sections.

Upon receipt of the foregoing, the case may be referred to Washington for consideration.

Very truly yours (Signed) Edgar M. Pilkinton, District Engineer.

EMP:MCB.

ce-Kiowa Indian Agency, Enclosure.

[fel. 200]

Ехнівіт. ". U-2"

United States Department of the Interior.

· Geological Survey

Box 976, Oklahoma City 1, Okla.

March 22, 1946.

T1S-SO-YO. 'Comanche 366—Lease 76 NW SE SE, 22 1S-9W, Well No. 5.

Magnolia Petroleum Co., P. O. Box 1828, Oklahoma City 1,

GENTLEMEN:

Receipt is acknowledged of your Notice of Intention dated March 15, 1946 to Drill & Test Well No. 5 on the subject land in NW SE SE Being 990 ft. from (/) (S) line 990 ft. from (E) (/) line of SE (1/4), 22 (Sec.), 1S (T), 9W (R.), Indian (Mer.), Walters (Field).

The proposed work as stated on said notice is hereby approved subject to compliance with the provisions of the applicable Oil and Gas Operating Regulations and subject to the additional conditions as follows:

- 1. Submit to this office:
- (a) Three copies of Well Record (form 9-569). Include tops of geologic formations identified, core descriptions, and dates and results of all production tests. Incomplete logs will be returned for additions.
 - (b) Two copies of any electric or other well survey made.
- 2. Notify this office of the date drilling operations are started.

Particular attention is directed to the requirements for leases provided in Sections 221.18 to 221.56, inclusive, of

the Operating Regulations. Generally, records and written notices relating to well operations must be submitted in accordance with sections 221.57 to 221.59, inclusive, of said Regulations. No change in the proposed operations as herein approved will be permitted unless acceptable notice of intention to change plans is submitted on Form 9-331b, in Triplicate, and approval obtained before such work is commenced.

Very truly yours, (Signed) John A. Anderson, Deputy Supervisor.

JAA mcb. cc-Kiowa Indian Agency, Tulsa Office, USGS.

[fol. 201]

Ехнівіт "U-3"

(Submit in triplicate)

United States Department of the Interior

Geological Survey

Form 9-2311.

(February 193--)

Indian Agency Kiowa Commanche 366. Allottee Tis so yo. Lease No. 76.

Sundry Notices and Reports on Wells

Notice of intention to drill deeper.
Notice of intention to change plans.
Notice of Intention to test water shut-off.
Notice of intention to redrill or Repair well.
Notice of intention to shoot or acidize.
Notice of intention to pull or alter casing.
Notice of Intention to abandon well.
Subsequent report of water shut-off.
Subsequent report of shooting or Acidizing.
Subsequent report of altering casing.
Subsequent Report of Redrilling or repair.
Subsequent Report of abandonment.
Supplementary well history.
Notice of intention to drill deeper—X.

NE

(Indicate above by check mark nature of report, notice, or other data.)

Oklahoma City, 4-1-46.

Well No. 5 is located 990 ft. from S line and 990 ft. from E line of sec. 22 (1/4 Sec. and Sec. No), 15 (Twp.), 9W (Range), Indian (Meridian), Walters (Field), Stephens (County or Subdivision), Oklahoma (State or Territory). The elevation of the derrick floor above sea level is — ft.

Details of Work

(State names of and expected depths to objective sands; show sizes, weights, and lengths of proposed casings; indicate muddling jobs, cementing points, and all other important proposed work.) Pursuant to authority granted by the Department, above well has been drilled to 2200'. Expected sand was not found at that depth and it is now our desire to test the Arbuckle expected at approximately 3700'. If authorized, we will drill to that depth with rotary, set and cement 7" on top of sand and drill in with standard tools. Well will be shot or acidized should it be deemed advisable. Work will be done in accordance with Departmental provisions and regulations.

I understand that this plan of work must receive approval in writing by the Geological Survey before operations may

be commenced.

Company Magnolia Petroleum Company, Address Box 1828, Oklahoma City, Oklahoma, by Division Superintendent, Title (signed by) A. H. Proctor.

U.S. Government Printing Office, 6-7053-b.

EXHIBIT "U-4"

United States Department of the Interior

Geological Survey

Box 976, Oklahoma City 1, Okla.

April 3, 1946.

TIS-SO-YO. Comanche 366. Lease 76. NW SE SE, 22-1S-9W. (Well No. 5.)

Magnolia Petroleum Co., P. O. Box 1828, Oklahoma City 1, Okla.

GENTLEMEN:

Receipt is acknowledged of your Notice of Intention dated April 1, 1946 to Drill Deeper well No. 5 on the subject land in NW SE SE being 990 ft. from South line & 990 ft. from East line of SE¹/₄ (¹/₄), 22 (Sec.), 1S (T.), 9W (R.), Indian (Mer.), Walters (Field).

The proposed work as stated on said notice is hereby approved subject to compliance with the provisions of the applicable Oil and Gas Operating Regulations and subject to the additional conditions as follows:

This confirms approval to drill deeper given you by telephone on April 1.

Particular attention is directed to the requirements for lessees provided in Section 221.18 to 221.56, inclusive of the Operating Regulations. Generally, records and written notices relating to well operations must be submitted in accordance with Sections 221.57 to 221.59, inclusive, of said Regulations. No change in the proposed operations as herein approved will be permitted unless acceptable notice of intention to change plans is submitted on Form 9-331b, in Triplicate, and approval obtained before such work is commenced.

Very truly yours, (Signed) John A. Anderson, Deputy Supervisor.

JAA:b.

ce-Kiowa Indian Agency, Tulsa Office USGS.

[fol. 203] Ехнівіт "V-2".

United States Department of the Interior Geological Survey

P. O. Box 976, Oklahoma City, Oklahoma November 4, 1943.

Rachael H. Robedeaux, Otoe 186—Lease 78, Well No. 2, SE SE SE, 32-23N-3E

Magnolia Petroleum Company, P. O. Box 1828, Oklahoma City, Oklahoma.

GENTLEMEN:

Receipt is acknowledged of your Notice of Intention dated Nov. 1, 1943, to Plub Back & Test well No. 2 on the subject land in SE SE SE being 330 ft. from (S) line & 330 ft. from (E) line of SE (1/4), 32 (Sec.), 23N (T.), 3E (R.), Indian (Mer.), Watchorn (Field).

The proposed work as stated on said notice is hereby approved subject to compliance with the provisions of the applicable Oil and Gas Operating Regulations and subject

to the additional conditions as follows:

A subsequent report of the work done and the results obtained must be submitted upon completion of the operations authorized.

Please notify this office of the date on which the work will be started.

Particular attention is directed to the requirements for lessees provided in Sections 221.18 to 221.56, inclusive, of the Operating Regulations. Generally, records and written notices relating to well operations must be submitted in accordance with sections 221.57 to 221.59, inclusive, of said Regulations. No change in the proposed operations as herein approved will be permitted unless acceptable notice of intention to change plans is submitted on Form 9-331b, in Triplicate, and approval obtained before such work is commenced.

Very truly yours, (Signed) John A. Anderson, District Engineer.

JAA:MCB.

cc—Pawnee Indian Agency. cc—Tulsa Office USGS. **Ехнівіт** "V-6"

United States Department of the Interior

Geological Survey
P. O. Box 976, Oklahoma City 1, Oklahoma.

February 17, 1944.

Rachael H. Robedeaux, Otoe 186—Lease 78, Well No. 2, SE SE SE, 32-22N-3E

Magnolia Petroleum Company, P. O. Box 1828, Oklahoma City, Oklahoma.

GENTLEMEN:

Receipt is acknowledged of your Notice of Intention dated February 14, 1944 to Abandon Well No. 2 on the subject land in SE SE SE being 330 ft. from (W) (S) line & 330 ft. from (E) (M) line of SE (1/4), 32 (Sec.), 22N (T.), 3E (R.), Indian (Mer.), Watchorn (Field).

The proposed work as stated on said notice is hereby approved subject to compliance with the provisions of the applicable Oil and Gas Operating Regulations and subject to the additional conditions as follows:

Bottom of the hole to be filled with heavy mud before the casing is parted and mud to be added as easing is pulled. No cement or other permanent cap is to be placed in the well at the surface until settling of the mud has ceased and any remaining space has been refilled with mud.

A subsequent report of abandonment (form 9-331b) in triplicate, stating the details of the work done and the date completed must be submitted.

Particular attention is directed to the requirements for lessees provided in Sections 221.18 to 221.56, inclusive of the Operating Regulations. Generally, records and written notices relating to well operations must be submitted in accordance with Sections 221.57 to 221.59, inclusive, of said Regulations. No change in the proposed operations as herein approved will be permitted unless acceptable notice of intention to change plans is submitted on Form 9-331b,

in Triplicate, and approval obtained before such work is commenced.

Very truly yours, (Signed) John A. Anderson, District Engineer.

JAA:MCB.

cc—Pawnee Indian Agency.
Tulsa Office USGS.

Please notify this office of the date on which abandonment will be started in order that a representative may be present if circumstances permit.

[fol. 205] b.

EXHIBIT "C-1"

Pawnee, Oklahoma, November 2nd, 1943.

I, the undersigned, Superintendent of the Pawnee Indian Agency do hereby certify that the attached Trust Patent is a true and correct copy of such instrument as shown by the records of the Pawnee Indian Agency, Pawnee, Oklahoma.

— — Superintendent, Pawnee Indian Agency, Pawnee, Oklahoma.

[fol. 206] The United States of America

To All to Whom These Presents Shall Come, Greeting:

Whereas, There has been deposited in the General Land Office of the United States a schedule of allotments approved by the Secretary of the Interior January 17, 1907, whereby it appears that Rachel H. Robedeaux an Indian of the Otoe and Missouria tribe or band has been abouted the following described land,

The South East quarter of Section thirty two, and the South West quarter of the South West quarter of Section thirty three in Township twenty three North of Range three East of Indian Meridian in Oklahoma, containing two hundred acres.

Now Know Ye, that the United States of America in consideration of the premises, has allotted, and by these presents does allot, unto the said Rachel H. Robedeaux the land above described, and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian, and that at the expiration of said period the United States will convey the same by patent to said Indian, in fee, discharged. of said trust and free of all charge or incumbrance whatsoever, if the said Indian does not die before the expiration of the said trust period; but in the event said Indian does die before the expiration of that period this patent and the allotment upon which it is based shall be canceled, and the said land shall revert to the United States and be thereafter disposed of in the manner prescribed by law;

Provided, that the President of the United States may, in

his discretion, extend said period.

In Testimony Whereof, I, Theodore Roosevelt, President of the United States of America, have caused these Letters to be made Patent and the Seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, this tenth day of June, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty first.

By the President, Theodore Roosevelt, by F. M. Mc-

Kean, Secretary.

Recorded Vol. 616, p. 383. Miscellaneous. H. M. Canford, Recorder of the General Land Office.

[fol. 207]

Ехнівіт "C-2"

Pawnee, Oklahoma, November 2nd, 1943.

I, the undersigned, Superintendent of the Pawnee Indian Agency do hereby certify that the attached Approval of Heirship is a true and correct copy of such instrument as shown by the records of the Pawnee Indian Agency, successor to the Ponca Agency, Pawnee, Oklahoma.

Successor to the Ponca Agency, Pawnee, Oklahoma.

[fol. 208]

Probate 86159-24. R.W.B.

Department of the Interior, Office of Indian Affairs.

Dec 8, 1924.

Ponca Agency, Oklahoma. Approval of heirship to Estate of Rachel Homoratha Robedeaux

Respectfully submitted to the Secretary of the Interior recommending finding herewith, as in accordance with the laws of Oklahoma.

It appears from the evidence adduced at the hearing that Rachel Homoratha Robedeaux, deceased Otoe allottee #186, died April 28, 1924, at the age of 67 years, intestate, married, and with issue, leaving surviving as her only heirs, Felix Robedeaux, husband, and Horton Homoratha, son, entitled to inherit an interest of ½ each, under the laws of descent and distribution in force and effect in the State of Oklahoma at the time of allottee's death. It is therefore recommended that the heirs to allottee's estate be found as herein above indicated.

It appears that allottee was married twice; First, to John Homoratha, prior deceased, by Indian Custom, before allotments three children having resulted from the marriage, namely, James Homoratha and Mariah Homoratha, both of whom died when they were children, before the allottee, and Horton Homoratha, son, who is still living, and entitled to inherit as above set out. Second, to Felix Robedeaux, living, by Indian Custom in 1896, one child having resulted from the marriage, namely, Drosie Robedeaux, who died in infancy before the allottee.

It appears that allottee was originally allotted the E½ of NW¼ of Section 26, Township 23 N., Range 1 East, and the SE¼ of Section 32, Township 23 N, Range 3 East I.M. Allotted under the Act of February 8, 1887 (24 Stat. 388), as amended by the Act of March 3, 1891 (26 Stat., 989), trust patent issuing therefor

Of the above described property the E½ of NE¼ of Section 20, Township 23 N, Range 1 East was sold prior to the death of the allottee (L.S. 62150-22), the W½ of the SE¼ was deeded to Horton Homoratha October 4, 1922 (L.S. 62150-22) and the E½ of the SE¼ was deeded to Horton Homoratha (L.S. 12756-24). At the time of the death of the allottee it appears that he was possessed of no trust real estate.

It appears that allottee's personal property consists of \$1605.42, accrued from land sales and interest prior to her death, the same being deposited to the official credit of the Superintendent of Ponca Agency, Oklahoma, S.D.A.

No homestead rights exist. No will was executed. No inherited interests. Total appraised value of entire trust

estate \$1605.42

Respectfully, (Signed) E. B. Meritt, Assistant Commissioner.

MR-11-22-24.

[fol. 209]. Probate 86159-24. R.W.B.

Department of the Interior

Ponca Agency, Oklahoma. Approval of heirship to Estate of Rachel Homoratha Robedeaux;

Dec-9, 1924.

The proceedings in the matter of the heirship to the estate of Rachel Homoratha Robedeaux deceased Allottee No. 186, of the Otoe Tribe, are hereby approved according to the Act of June 25, 1910 (36 Stat. L., 855); as amended by Act of February 14, 1913 (37 Stat. L., 678), and the Regulations of the Department, and I find and adjudge that at the date of the hearing held October 15, 1924, the heir to the estate of the decedent and their respective shares were as follows;

Felix Robedeaux, husband Horton Homoratha, son

1/2

It is found that allottee's personal property consists of \$1605.42, accrued from land sales and interest prior to her death, the same being deposited to the official credit of the superintendent of Ponca Agency, Oklahoma, S.D.A.

No inherited interests appear.

No homestead rights exist.

No will was executed.

Total appraised value of entire trust estate \$1605.42.

A fee of \$25.00 is to be collected by the Superintendent of Ponca Agency, Oklahoma, under the act of January 24, 1923, (42 Stat. L. 1174-1185).

(Signed) F. M. Goodwin, Assistant Secretary.

[fol. 210]

Ехнівіт "C-3"

Pawnee, Oklahoma, November 2nd, 19-

I, the undersigned, superintendent of the Pawnee Indian Agency do hereby certify that the attached

Deed Noncompetent Indian Lands

is a true and correct copy of such instrument as shown by the records of the Pawnee Indian Agency, Pawnee, Oklahoma.

Agency, Pawnee, Oklahoma.

[fol. 211] Office of Indian Affairs. Received Feb. 16, 1924

5-183-a

Deed Noncompetent Indian Lands

This Indenture, Made and entered into this 31st day of January one thousand nine hundred and 24, by and between Rachel H. Robedeaux, wife and Felix Robedeaux, husband of Red Rock, Oklahoma, noncompetent Over and Missouria Indian, parties of the first part, and Horton Homoratha of Red Rock, Oklahoma party of the second part:

Witnesseth, That said parties of the first part, for and in consideration of the sum of One dollar (\$1.00) dollars, in hand paid, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, and convey unto said party of the second part the following-described real estate and premises situated in Pawnee County, State of Oklahoma, to wit: E/2 of the SE/4 of 32-23N-3E.I M. containing 80 acres, more or less according to Government survey.

Subject to the condition that while the title is in the grantee or heirs, the land herein described shall not be alienated or incumbered without the consent of the Secretary of the Interior.

The Grantor reserves the right to use all rents, profits, minerals especially oil and gas, during her life from the land conveyed herein, together with all the improvements thereon and the appurtenances thereunto belonging. And the said parties of the first part, for themselves and their heirs, executors, and administrators, do hereby covenant,

promise, and agree to and with the said party of the second part, his heirs and assigns, that he will forever warrant and defend the said premises against the claim of all persons, claiming or to claim by, through, or, under him only.

To have and to hold said described premises unto the said party of the second part, his heirs, executors, adminis-

trators, and assigns, forever.

. In Witness Whereof, The said parties of the first part have hereunto set their hand and seals the day and year first-above written.

Rachel H. Robedeaux (Her Thumb Mark). (Seal.) Felix Robedeaux (His Thumb Mark). (Seal.)

Witnesses: Frank Shadlow, Morgan Fawfaw.

[fol. 212] Indexed. 49233. Noncompetent Indian Deed from Rachel H. Robedeaux to Horton Homoratha. State of Oklahoma, Pawnee County, ss. This instrument was filed for record on the 27 day of Mar., 1924 at 1:30 o'clock P. M., and duly recorded in Book 45 Deeds, on page 137. Maude C. Nelson, County Clerk, Register of Deeds. Mabel Riseling, Deputy. (Seal.) 1.25.

Proof Read. Otoe 185. Department of the Interior, Office of Indian Affairs. Mar. 1, 1924. The within deed is respectfully submitted to the Secretary of the Interior, with the recommendation that it be approved. C. F. Hawke, Chief Clerk. Department of the Interior. Mar. 6, 1924. The within deed is hereby approved. F. M. Goodwin, Assistant Secretary. Office of Indian Affairs, Land Division. Mch. 8, 1924. Recorded in Deed Book, Inherited Indian Lands, Vol. 47, page 41. MMS.

Acknowledgement-By Mark

THE STATE OF OKLAHOMA Noble County, ss:

Before me R. Schultz a Notary Public, in and for said County and State, on this 31st day of January 1924, personally appeared Rached H. Robedeaux and Felix Robedeaux, her husband, to me known to be the identical persons who executed the within and foregoing instrument by thumb mark, and in my presence and in the presence of Frank Shadlow and Morgan Fawfaw as witnesses, and acknowledged to me that they executed the same as their free and

voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and Notarial seal, the day and year above set forth.

R. Schultz, Notary Public, Noble County, Okla. My Commission expires October 25, 1924. (Seal.)

[fol. 213]

Ехнівіт "C-4"

Pawnee, Oklahoma, November 2nd, 1945.

I, the undersigned, Superintendent of the Pawnee Indian Agency do hereby certify that the attached Deed Non-competent Indian Lands is a true and correct copy of such instrument as shown by the records of the Pawnee Indian Agency, Pawnee, Oklahoma.

_____, Superintendent, Pawnee Indian Agency,

Pawnee, Oklahoma.

[fol. 214] Office of Indian Affairs. Received Sep. 26, 1922. 76839.

Office of Indian Affairs. Received Aug. 2, 1922. 62150.

5-183-a

Deed Noncompetent Indian Lands

This Indenture, Made and entered into this 4th day of October one thousand nine hundred and 21, by and between Rache' H. Robedeaux, wife, and Felix Robedeaux, husband, of Red Rock, Oklahoma, noncompetent Otoe and Missouria Indian, parties of the first part, and Horton Homoratha of Red Rock, Oklahoma, party of the second part:

Witnesseth, That said parties of the first part, for and in consideration of the sum of One dollars (\$1.00) dollars, in hand paid, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, and convey unto said party of the second part the following described real estate and premises situated in Pawnee County, State of Oklahoma, to wit: W/2 of the SE/4 of 32-23N-3E.I.M. containing 80 acres, more or less, according to Government survey: Subject to the condition that while the title is in the grantee or

heirs, the land herein described shall not — alienated or incumbered without the consent of the Secretary of the Interior. The grantor reserves the right to use all rents, profits, minerals, especially oil and gas, during her life from the land conveyed herein together with all the improvements thereon and the appurtenances thereunto be longing. And the said parties of the first part, for themselves and their heirs, executors, and administrators, do hereby covenant, promise, and agree to and with the said party of the second part, his heirs and assigns, that they will forever warrant and defend the said premises against the claim of all persons, claiming or to claim by, through, or under them only.

To have and to hold said described premises unto the said party of the second part, his heirs, executors, administra-

tors, and assigns, forever.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Rachel H. Robedeaux (her thumb mark). (Seal.)
Felix Robedeaux (his thumb mark). (Seal.)

Witnesses: Lizzie Homoratha, Edna Tearney.

[fol. 215] Acknowledgments must be in accordance with the forms prescribed by the State in which the land is situated.

STATE OF OKLAHOMA,

County of Noble, ss:

Be It Remembered, that on this 4th day of October, A. D. 1921 before the undersigned, a Notary Public in and for the County and State aforesaid, personally appeared Rachel H. Robedeaux and Felix Robedeaux to me personally known to be the identical persons who executed the within instrument of writing, and by their mark, and in my presence and in the presence of Lizzie Homoratha and Edna Tearney and such persons duly acknowledged the execution of the same, as their free and voluntary act and deed for the uses and purposes herein set forth.

In Testimony Whereof, I have hereunto subscribed my name and affixed my notarial seal on the day and year last-

above written.

R. Schultz, Notary Public. (Seal.)

My commission expires Oct. 25, 1924.

Indexed 43863

Noncompetent Indian Deed from Rachel H. Robedeaux et al. to Horton Homoratha.

STATE OF OKLAHOMA, Pawnee County, ss:

This instrument was filed for record on the 8 day of Nov., 1922, at 9 o'clock A. M., and duly recorded in Book 42 DR; on page 405.

- Mande C. Nelson, County Clerk. Mabel Riseling, Deputy. (Seal.)

1.25.

Proofread

Department of the Interior, Office of Indian Affairs

Oct. 2, 1922.

The within deed is respectfully submitted to the Secretary of the Interior, with the recommendation that it be approved.

C. F. Hawke, Chief Clerk. W.

Department of the Interior

Oct. 7, 1922.

The within deed is hereby approved.

F. M. Goodwin, Assistant Secretary.

Office of Indian Affairs, Land Division

Oct. 17, 1922.

Recorded in Deed Book, Inherited Indian Lands, Vol. 43, page 247.

MMS.

Ехнівіт "С"

3630 Patent

Filed for record Oct. 19, 1939 at 9:30 A. M. (Recorded in Book 88 of Deeds, Page 191) Eddie Cole, County Clerk. (Seal.)

The United States of America, to the Heirs of Mary Molino:

1777598. 32382-39 I. O. 943 & 942

THE UNITED STATES OF AMERICA .

To All to Whom These Presents Shall Come, Greeting:

Whereas, an Order of the Secretary of the Interior has been deposited in the General Land Office, directing that a fee simple patent issue to the claimants, the heirs of Mary Moleno, devisee of Moleno, heir of Wau-co-chah and Kla-daing (BlackApache) Apache Indians, for an undivided onefourth interest in and to the east halfoof the northeast quarter of Section eight, the west half of the Northwest quarter of Section nine, the west half of the southwest quarter of Section three, and the north half of the northwest quarter of Section ten in Township five north of Range nine west of the Indian Meridian, Oklahoma, excepting from the effect of this conveyance however, that certain parcel of ground containing twelve acres and nineteen hundredths of an acre; in the west half of the southwest quarter of said Section three, heretofore conveyed to the St. Louis-San Francisco Railway Company, by deed approved March 3, 1930, and recorded in Indian Office Deed Book, Volume 58 at page 63 and also, that certain parcel of ground containing eight acres and thirteen hundredths of an acre in the northwest quarter of the southwest quarter of said section three, heretofore conveyed to the Magnolia Petroleum Company, with mineral rights reserved, by deed approved [fol. 217] July 31, 1930, and recorded in the Indian Office Deed Book, Volume 59 at page 85 in the Office of the Commissioner of Indian Affairs, containing, after making the exceptions above specified, two hundred ninety-nine acres and sixty-eight hundredths of an acre:

Now Know Ye, That the United States of America, in consideration of the premises, has given and granted and

by these presents does give, and grant, unto the said claimants, and to the heirs of the said claimants, an undivided one fourth interest in the Land above described; to Have and To Hold the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimants and to the heirs and assigns of the said claimants forever.

In Testimony Whereof, I, Franklin D. Roosevelt, President of the United States of America, have caused these letters to be made patent and the seal of the General Land

Office to be hereunto affixed.

Given under my hand at the City of Washington, the Twenty-fifth day of September, in the year of our Lord One thousand nine hundred and thirty-nine and of the Independence of the United States the One hundred and sixty-fourth.

By the President, Franklin D. Roosevelt, by Jeanne Kavanagh, Secretary. R. S. Clinton, Acting Recorder of the General Land Office. (Seal.)

Recorded: Patent Number 1105386.

[fol. 218] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 219] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED ON-Filed April 10,

In this appeal the appellant, Oklahoma Tax Commission, states that it intends to rely on the following enumerated points:

1. The taxes imposed and by appellee protested are: (1) A nondiscriminatory gross production tax in an amount equal to five per centum of the gross value of the oil, gas, and casinghead gas produced, but not to exceed what otherwise would be the rate for ad valorem purposes if subjected to that tax, the tax being levied in lieu of all other taxes on the oil, gas, casinghead gas and all appliances, tools and

- machinery directly used and employed in the production; (2) A nondiscriminatory excise tax, up to July 1, 1943, of 1s of 1s per barrel on all oil produced and thereafter the same character of tax of one mill per barrel on all oil produced.
- (a) The properties from which the oil and gas was produced lie wholly within the State of Oklahoma and all acts necessary in producing the oil, gas and casinghead gas were performed in Oklahoma.
- (b) The validity and constitutionality of the statutes under which the taxes were imposed have been sustained by the Supreme Court of Oklahoma. In denying the State [fol. 220] of Oklahoma its inherent sovereign right to impose and collect the taxes above referred to, on the oil, gas and casinghead gas produced and accruing to the 7/8 working interest of appellee under the departmental leases covering the lands of restricted Indians, including among which lands are lands in which non-Indians owned an undivided interest in the 1/8 royalty interest, the Supreme Court of Oklahoma has violated the inherent sovereign and constitutional rights of the State of Oklahoma as one of the sovereign states of the Union to levy and collect taxes on subjects wholly within her jurisdiction.
- 2. The United States had and helder right, title, interest or ownership in and to the 7/8 working interest held and owned by appellee or in and to the production accruing to said interest. Therefore, an imposing of the taxes in controversy did not constitute a taxing of properties of the United States.
- 3. An imposing of the tax will not burden or effect the property rights of any restricted Indian and his accruals from the oil, gas and easinghead gas produced will neither be lessened nor diminished.
- 4. The fact that appellee operated and produced oil and gas under departmental leases from wells located on the lands of restricted Indians, did not make and constitute it a United States agency or a federal instrumentality. The appellee was a private corporation and its business of operating and producing the oil, gas and casinghead gas was a private business.

- 5. An imposing of the taxes in controversy will not directly burden, interfere with or hinder the United States Government in carrying out its supervisory functions in [fol. 221] connection with the properties of any restricted Indian. The effect of imposing the tax, if any, is indirect, inconsequent all and remote.
- 6. An imposing of the tax will not deprive the appellee of the power to serve the United States Government as it was intended that it should serve, or hinder or deter/it in so serving.
- 7. Non-Indians owned a fractional interest and part of the 1/8 royalty interest. The production accruing to those interests and the relationship that those interests bore toward the appellee had no possible connection with any theory of federal instrumentality or federal agency.

Joe M. Whitaket, R. F. Barry, Attorneys for Appellants.

[fol. 222]

Acknowledgment of Service

Personal service of a true and correct copy of the foregoing motion, entitled "Statement of Points to be Relied on," is acknowledged to have been made on me this 7 day of April, 1948.

Robert W. Richards, Wendell J. Doggett, Attorneys

for Appellee

[fol. 223] IN THE SUPREME COURT OF THE UNITED STATES

Designation of the Parts of the Record to be Printed-Filed April 10, 1948

The Oklahoma Tax Commission, appellant in the above styled and numbered cause, respectfully requests that all portions of the record heretofore filed herein be printed, omitting only those portions thereof that it is provided in sub-section 9 of Rule No. 13 of the above named court, may be omitted.

Joe M. Whitaker, R. T. Barry, Attorneys for Oklahoma Tax Commission

[fol. 224]

Acknowledgment of Service

Personal service of a true and correct copy of the foregoing motion, entitled "Designation of the Parts of the Record to be Printed" is acknowledged to have been made on me this — day of April, 1948.

Robert W. Richards, Wendell J. Doggett, Attorneys

for Appellee

[fol. 224a] [File endorsement omitted]

[fol. 225] Supreme Court of the United States

[Title omitted]

Appeal from the Supreme Court of the State of Oklahoma.

ORDER DISMISSING APPEAL AND GRANTING APPLICATION FOR WRIT OF CERTIORARI—April 19, 1948

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Oklahoma, and was duly submitted.

On consideration whereof, It is now here ordered by this Court that the appeal heroin be, and the same is hereby, dismissed for the want of jurisdiction.

Treating the appeal papers herein from the Supreme Court of the State of Oklahoma as an application for a writ of certiorari;

On consideration whereof, It is ordered by this Court that the said application for writ of certiorari be, and it is hereby, granted. The case is consolidated with No. 703 for argument. The Solicitor General is requested to file a brief as amicus curiae.

Endorsed on cover: File No. 52,934 Oklahoma, Supreme Court, Term No. 704. Oklahoma Tax Commission, Appellant, Petitioner vs. Magnolia Petroleum Company. Filed March 30, 1948. Term No. 704 O.T. 1947.

SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 793 40

OKLAHOMA TAX COMMISSION,

Appellant,

THE TEXAS COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATEMENT AS TO JURISDICTION

Mac Q. Williamson,
Attorney General;
Fred Hansen,
Assistant Attorney General;
R. F. Barry,
Counsel for Appellant.

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SUPPEME COURT OF THE UNITED STATES OCTOBER TERM, 1947

No. 703

THE TEXAS COMPANY, A CORPORATION.

Appellee

OKLAHOMA TAX COMMISSION, ST

Appellant

STATEMENT AS TO JURISDICTION

This case originated before the Oklahoma Tax Commission where hearing was duly had and the tax assessment complained of duly made by a timely order of that Commission that under the laws of the State of Oklahoma an aggrieved taxpayer in the exercise of statutory rights, may file a suit in the District Court of Oklahoma County wherein a trial of the issues may be had; such a case was so filed in the District Court of Oklahoma County, which court sustained a general demurrer to the petition of the plaintiff in that case, the Texas Company, appellee in this appeal, from which said judgment, the Texas Company appealed to the Supreme Court of Oklahoma wherein the said judgment of the District Court of Oklahoma County, Oklahoma, was reversed and in which the said State Supreme Court held:

"A lessee producing oil from lands of restricted Kiowa and Apaché Indians under departmental lease approved by and subject to supervision of the Secretary of the Interior of the United States, is engaged in the operation of a governmental instrumentality or agency and in the absence of permissive legislation by Congress, or appropriate Federal consent or waiver or withdrawal of immunity, the oil production or the oil as produced is not subject to the state excise taxof one eighth of one cent per barrel, nor the state gross production tax of five per cent of the value of the oil produced."

That upon the rendition of said opinion, petition for rehersing was filed with the Supreme Court of the state and while said petition was pending, a motion was filed with the permission of said court (without prejudice to appellant, Tax Commission's petition for rehearing and without prejudice to its right of appeal) wherein the court was asked to modify its opinion upon the ground that it having been alleged by the plaintiff in error, oil company, and admitted by the defendant in erger, the Oklahoma Tax Commission, that the oil and gas constituting the subject matter of the tax, was produced from what is commonly termed restricted Indian land under departmental leases under the supervision and regulation of the Secretary of the Interior in the same manner that all oil and gas is so produced from Indian lands under the jurisdiction of the Secretary of the Interior are managed and handled.

Whereupon, the court entered its final order and judgment modifying and correcting the former opinion in which said cause was reversed, thereby entering a judgment appealable to this court; the Supreme Court of the State of Oklahoma being the highest court of the state as defined in the United States Statute and the rules of this Court authorizing appeal. The case was, therefore, remanded to the District Court with instructions to enter judgment for the plaintiff, the Texas Company, as directed.

Whereupon, a motion to withhold mandate pending an appeal to the Supreme Court of the United States was timely filed and on the 10th day of February, 1948, the Supreme Court of the State of Oklahoma made and entered the following order:

"In the Supreme Court of the State of Oklahoma The Court is Hereby Directed to Enter the Following Orders:

32,270—The Texas Co. v. Oklahoma Tax Commission. 32,678—Magnolia Petroleum Co. v. Oklahoma Tax Commission

Ordered that mandate in the above styled causes be stayed until April 29, 1948, pending appeal to the U. S. Supreme Court, and thereafter until Final disposition by that court if appeals are perfected within time allowed."

The State Statute involved in this controversy is found in Ch. 20, Title 68, Sec. 821 et seq. Q. S. 1941, as amended by Ch. 20, Sec. 827, O. S. 1947, Cumulative Supplement, and also found in 1947 S.L. page 495 as Articles 1 and 2. The levving clause under which the said tax involved in this litigation is levied is Sec. 821 O. S. 1941, and levies a tax of 5% on the gross amount at the actual cash value of all the oil and gas produced within the State of Oklahoma, which said tax when so levied shall be in lieu of all taxes by the State, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon producing leases for the mining of asphalt and ores bearing leady zine, jack, gold, silver or copper, or for petroleum or other crude oil or other mineral oil, or for natural gas and/or casinghead gas, upon the mineral rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil. The said Act further provides that the State Board of Equalization upon its nitiative or upon motion may take testimony and if the rate of tax levied shall be found to be greater or less than the general ad valorem rate of taxation, then said Board may raise or lower the rate to conform to the general average of the ad valorem tax rate throughout the state in order to effect uniformity and equality under the Constitution since the gross production tax is in lieu of and a substitute for the ad valorem property tax.

The decision of the Supreme Court in holding that said Statute was invalid as applied to oil and gas produced from restricted lands belonging to the oil company producer, in that to apply such tax, violated the rights of said oil company, the Texas Company, under the various Acts of Congress, particularly the General Allotment Act of June 28, 1906, 34 Statute, 339, and the various amendments thereto wherein the trust period of said property belonging to restricted Indians of one-half or more Indian blood was extended finally to 1984.

The Federal statutory provision believed to sustain the jurisdiction of this Court is Sec. 237(a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 S. C. Secs. 344(a), 861(a).

Some of the decisions which are believed to sustain the jurisdiction are those interpreting the said Acts of Congress relating to Indian restrictions in the light of the State taxing power to-wit:

Oklahoma Tax Commission v. United States, 319 U. S. 598:

Helvering v. Mountain Producers Corporation, 303 U.S. -379, and a state case.

Santa Rita Oil Company v. State Board of Equalization (Idaho), 116 Pac. (2), 1012, which passes squarely and identically upon all the issues herein and following the Mountain Producers' case, sustains the tax of the State of Idaho on restricted Indian properties holding that all cases heretofore standing in the way of the admissibility of such tax are overruled. In that case it is further held:

"Nondiscriminatory operators' net proceeds and producers' license or gross production taxes on production of oil and gas under lease of trust patent Indian land do not constitute such direct and substantial interference with any function of federal government as to be invalid. Rev. Codes 1935, §§ 20888-2096.2, 2397-2408."

The Federal Question

The Federal question involved in this lawsuit is the denial to the State of Oklahoma and the Oklahoma Tax Commission of the right to levy, assess and enforce the revenue laws enacted for the support of the State and local governments on the ground that same contravene the Indian treaties with the United States, the Allotment Act and in, violation of the interpretation and construction of such treaties and Acts by the judiciary of both the State and national governments and particularly by the judgments of the United States Courts, including the Supreme Court thereof, in that to deny the State of its rights to tax, tends to destroy State and local government and deprives the State of its exercise of its first sovereign power necessary for the existence, and denies to the State the equal protection of the law as among States under the Constitution of the United States. Said Federal questions were raised in the briefs filed in the Supreme Court and in the petition for, rehearing and in the oral argument presented to said Court. 'It is, therefore, apparent that the construction and interpretation of the Acts of Congress are detrimental and

prejudicial to the rights of Oklahoma and the construction and interpretation of the Constitution of the United States with reference to the Oklahoma taxing statute and directly involved and drawn into question and have been decided adversely to the rights of the State of Oklahoma and Oklahoma Tax Commission, prosecuting this case in its behalf under statutory authority to do so as the constituted tax collecting agency for the collection and enforcement of all State tax measures.

That the judgment of the State Supreme Court constitutes a final judgment of the highest court of the State under the rules of this Court and the Act of Congress contained in the Judicial Code.

WHEREFORE, it is respectfully submitted that for the reasons stated, this Court has jurisdiction of the appeal.

Dated this 18 day of February, 1948.

Respectfully submitted,

Mac Q. Williamson,
Attorney General;
Fred Hansen,
Asst. Attorney General;
R. F. Barry,
Counsel for Appellant.

APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Filed in Supreme Court of Oklahoma, Sep. 23, 1947. Andy Payne, Clerk.

No. 32,270

THE TEXAS COMPANY, a Corporation, Plaintiff in Error,

US.

OKLAHOMA TAX COMMISSION, Defendant in Error

Syllabus

1. A lessee producing oil from lands of restricted Kiowa and Apache Indians under departmental lease approved by and subject to supervision of the Secretary of the Interior of the United States, is engaged in the operation of a governmental instrumentality or agency and in the absence of permissive legislation by Congress, or appropriate Federal consent or waiver or withdrawal of immunity, the oil production or the oil is produced is not subject to the state excise tax of one-eighth of one cent per bar el, nor the state gross production tax of five per cent of the value of the oil produced.

Appeal from the District Court of Oklahoma county. Hon. Lucius Babcock, Judge.

Action by the Texas Company, a corporation, against the Oklahoma Tax Commission to recover certain oil excise taxes and gross production taxes paid under protest of illegality. From an order sustaining demurrer to plaintiff's petition and rendering judgment for defendant, the plaintiff appeals.

REVERSED

Amos, Monnet, Hayes and Brown of Oklahoma City, Okla, Y. A. Land, John R. Ramsey, B. W. Griffity, all of Tulsa, Okla., for Plaintiff in Error. WELCH, J.

This action tests the validity of certain state tax assessments, gross production and oil excise tax, made against the Texas Company for oil production, under departmental leases on restricted lands of Kiowa and Apache Indians.

The plaintiff, hereinafter referred to as "Company," paid the taxes under protest to the Oklahoma Tax Commission, (hereinafter referred to as "Commission,") and sued for recovery back. Plaintiff claimed there was legal immunity from such taxes because in the operation of such leases and in the production of such oil, "Company" was an instrumentality of the federal government.

That such a lease is an instrumentality of the federal government has been held in many cases hereinafter cited. Among the first such cases, if not the first, was Indian Territory Illuminating Oil Company v. Oklahoma, 240 U. S. 522, 60 L. ed. 779.

As applied to a gross production tax on oil, the exact contention of "Company" of immunity from such tax was sustained in Large Oil Co. r. Howard, 248 U. S. 549, 63 L. ed. 416, and in Howard r. Gypsy Oil Co., 247 U. S. 504, 62 L. ed. 1239.

And the United States Congress has acted on the theory that such immunity exists in the case of leases of this character unless waived. The Congress has adopted acts expressly waiving such immunity and granting to this State the authority to apply the gross production tax as to certain designated Indian lands, the Osage Indian Lands by act in 1921 (41 Stat. at L. 1250), the Kaw Indian Lands by act in 1924 (43 Stat. at L. 176-177), and as to lands of the Five Civilized Tribes by act in 1928 (43 Stat. at L. 496.)

As applied to the oil excise tax the exact contention of immunity from such tax here made by "Company" has been sustained by this court in Barnsdall Refineries, Inc. v.

Oklahoma Tax Commission, 171 Okla. 145, 145 P. (2d) 918, affirmed in Oklahoma *v*. Barnsdall, 296 U. S. 521, 80 L. ed. 366;

Thus it has been established and for many years recognized in this court, in the Congress and in the Supreme Court of the United States, that in the case of such leases neither of the taxes here involved may be imposed without waiver of immunity or permissive legislation by the Congress.

But the "Commission" contends that, in foundation, the above rule rests upon other and former decisions of the Supreme Court of the United States dealing generally with the "governmental instrumentality" rule, and that all such former decisions as well as those heretofore cited, were in effect overruled in Helvering v. Mountain Producers Corp., 303 U. S. 376, 82 Leed. 907.

Upon consideration of that point we observe the Mountain Producers case relates to income tax assessed against the net income or personal profit earned by a lessee in a position similar to that of "Company".

Long prior to the Mountain Producers case that court had extended the governmental instrumentality rule to include such personal income or profit within the tax immunity, and had held that income tax could not be assessed against such an oil and gas lessee. See Gillespie v. Oklahoma, 257 U.S. 501, 66 L. ed. 338, and Burnett v. Coronado Oil and Gas Co., 285 U.S. 393, 76 L. ed. 815.

The decision in the Mountain Producers cases was a reconsideration of that exact income tax question, and in the latter case that court held that such extension of the governmental instrumentality rule was without adequate foundation or support, and that court expressly overruled the two former decisions, the Gillespie case and the Burnett case, and expressly held in the Mountain Producers case that the income tax might properly be assessed.

While that court thus specifically restricted the limits of the governmental instrumentality rule to that extent, we do not find in that decision any abolition of the rule, or any further departure from former application of the rule than is specifically made in and by that decision. The Mountain Producers ease specifically overruled the two former income tax cases mentioned, but did not expressly overrule either of the gross production tax cases above cited nor the Barnsdall case, supra, nor indicate any specific intention of so doing.

It is the view of the writer of this opinion, speaking for himself alone, that for the reasons pointed out in the briefs one might well join in the request that the Supreme Court of the United States reconsider this question as applied to a tax on the oil as it did reconsider the question as applied to the tax on the personal income or net profit of the oil producer, which consideration resulted in a reversal of the rule as to such income tax as we have noted. But it is thought beyond the power of this court to now engage in such reconsideration, in view of the cited decisions of the higher authority which thus far wholly sustain the claim of "Company" to immunity from the tax here involved:

Upon questions of federal law, citizens and their attorneys have the right to rely upon decisions of the Supreme Court of the United States, and upon such questions it is our fixed duty to follow such decisions, leaving to the United States Congress or Supreme Court the making of the necessary changes in such legal rules.

In a later case, United States v. County of Allegheny, 322 U.S. 174, 88 L. ed. 1209, the Supreme Court of the United States recognized that the in the Mountain Producers case the rule of implied immunity had been "sharply curtailed," but that is not to say an abolition of the rule, but a limitation or curtailment thereof, definitely leaving the balance thereof in full force.

Other authorities are cited to support the view of "A ommission" as to the implied or extended effect to be given the Mountain Producers decision. We have considered them but find further discussion of them not necessary, other than to say that we cannot construe the decision in the Mountain Producers case to to the extent contended for.

We regard the decisions of the Spereme Court of the United States, supra, as binding upon us, and in view

thereof the plaintiff's petition stated a cause of helion. It was error to sustain a demurrer thereto.

The judgment for defendant is reversed, with directions to overrule the demurrer to plaintiff's petition and proceed consistent with the views here expressed.

Hurst, C. J., Davison, V. C. J., Riley, Gibson and Luttrell, U.J., concur.

Corn, J., dissents.

Filed in Supreme Court of Oklahoma, Jan. 22, 1548.

Andy Payne, Clerk.

APPENDIX "B"

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 22.270

THE TEXAS COMPANY, a Corporation, Plaintiff in Error,

OKLAHOMA TAX COMMISSION, Defendant in Error

Order Correcting Opinion

It is ordered that the opinion filed herein on September 23, 1947, be, and the same is corrected in the following two particulars, to wit:

I. That on the Caption Sheet the word "Reversed" is stricken and in lieu thereof the following words are inserted, to-wit: "Trial Court, Judgment For Defendant Reversed and Judgment Rendered For Plaintiff,"

II. The last paragraph of the opinion is hereby stricken and in lieu thereof the following paragraph is inserted to-wit:

"The trial court judgment for defendant is reversed.

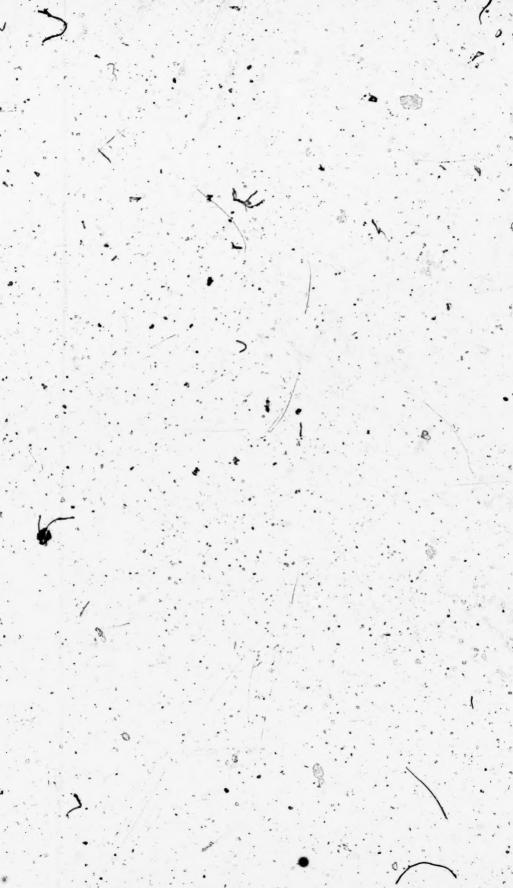
And since there is no question as to the aforesaid

facts, which are alleged by plaintiff and admitted by defendant, final judgment is hereby rendered for plaintiff and against the defendant for the sum sued for. The cause is remanded with directions to the trial court that such judgment be duly entered of record."

Done by order of the Court in conference this 22 day of January, 1948.

THURMAN S. HURST, Chief Justice.

(5625)



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No. 40

In the Supreme Court of the United States

October Term, 1948.

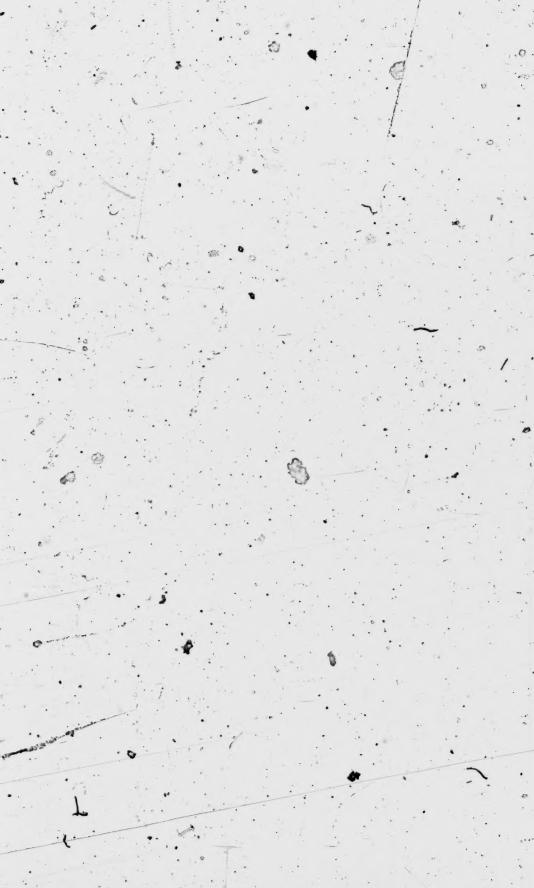
OKLAHOMA TAX COMMISSION, Petitioner,

THE TEXAS COMPANY.

BRIEF OF THE TEXAS COMPANY.

B. W. GRIFFITH,
Tulsa, Oklahoma,
Attorney for The Texas
Company, Respondent.

Y. A. LAND, B. A. AMES, FISHER AMES, Of Counsel.



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IN THE SUPREME COURT OF THE UNITED STATES. October Term, 1948.

No. 40

OKLAHOMA TAX COMMISSION, Petitioner, vs.

THE TEXAS COMPANY.

BRIEF OF THE TEXAS COMPANY.

Explanatory Remarks.

For convenience the Oklahoma Tax Commission will be referred to herein as "petitioner," and The Texas Company will be referred to as "respondent." Emphasis in the brief is ours unless otherwise stated. References to the transcript of record will be indicated as "R." followed by page number:

Opinion Below.

No opinion was filed by the District Court of Oklahoma County, Oklahoma. The opinion of the Oklahoma Supreme Court (not yet officially reported) was filed on September 23, 1947; order correcting opinion was filed on January 22, 1948, and petition for rehearing was denied on January 27, 1948. The opinion of the Supreme Court of Oklahoma is published in 18 Oklahoma Bar Journal, at pages 1339, et seq. (issue of September 27, 1947), and appears at pages 36-39 of the transcript of record. For the convenience of the Court we attach a copy of the opinion (less the caption) as "Appendix I" to the brief.

The order correcting opinion and rendering judgment for respondent for the sum sued for appears on page 44 of the transcript of record.

Jurisdiction.

Since the case presents the question of the constitutionality of certain taxing statutes of the State of Oklahoma under the Constitution of the United States, the jurisdiction of this Court under Sec. 237(b) of the Judicial Code, as amended (New Judicial Code, Sec. 1257(3)) seems to come within same.

Question Presented:

Whether, under the Constitution of the United States, the State of Oklahoma may, in the absence of Congressional consent, impose a gross production tax and a proration or excise tax upon the production of oil by a lessee under a departmental oil and gas lease from restricted lands of wild tribes Indians.

Statement of the Case.

Respondent instituted this action in the District Court of Oklahoma County, Oklahoma, to recover certain gross production taxes and proration or excise taxes which it had paid under protest as an aggrieved taxpayer on account of the production of certain oil, as lessee under departmental oil and gas leases, from restricted lands of certain wild tribes Indians. No congressional consent has been given to the levying of said taxes upon the production of such oil from these wild tribes Indian lands.

Petitioner's demurrer to respondent's petition and amendment thereto were sustained by the trial court, and respondent appealed from this action and from the resultant judgment to the Supreme Court of Oklahoma, which

last named court, with one dissenting justice Preversed the trial court and ordered judgment entered for respondent in the amount sued for, namely, \$3,854.18, being amount of gross production taxes paid in October and November, 1942, on account of the production of oil for the preceding two months, and \$77.74, being proration taxes paid in like months covering the same period of time, or a total of \$3931.92. (R. 7-10) The statement as to these taxes appearing on page 7 of petitioner's brief and logisting \$1936.05 is incorrect.

The petitioner's demurrer to respondent's petition and amendment to petition admitted all the facts set forth in those pleadings, together with all the inferences reasonably to be drawn therefrom.

-Crews v. Garber, 188 Okl. 570, 111 P. (2d) 1080; Collar v. Mills, 190 Okl; 481, 125 P. (2d) 197; Farmers, etc., Nat. Bank v. Lee, 192 Okl. 9, 132 P. (2d) 931.

Respondent alleged the execution of the three departmental oil and gas leases and their approval by the Secre-. tary of the Interior; their ownership by respondent; that the lands covered by the leases were lands of these wild tribe Indians; that the title to said lands remained in the United States of America which held same in trust for the respective restricted Indian allottees to whom said lands were respectively allotted, and were subject to the supervision and control of the United States of America; that the oil and gas leases covering said land were (except as to a fractional interest in one of the tracts as to which supervision had been released) also subject to the supervision and control of the United States; and that said leases were executed pursuant to the provisions of the General Allotment Act (Chap. 119, 24 Stat. 388) and of acts amendatory thereto. (R. 3-5, 29-30)

Respondent further alleged that in the operation of said leases and in the production of oil thereunder it and each of said leases was and is a Federal instrumentality and agency, or an instrumentality of the United States Government; that the petitioner required respondent to pay the gross production taxes and proration taxes in question; that respondent was not liable for the payment of such taxes for the reasons stated and that accordingly the taxing statutes. in question were inapplicable thereto; but that if said taxing statutes were held applicable to the production of said oil, then that such statutes and the taxes sought to be levied thereby were illegal and void and violative of the United States Constitution as imposing a burden and restriction upon an agency and instrumentality of the United States Government, and interfered with the performance of respondent's duties and functions as such an instrumentality and agency; that the imposition of such taxes infringed upon and attempted to restrict and burden the Government's plenary powers in the administration and conduct of the properties and affairs of its Indian wards; that said taxes, and the statutes purporting to levy same, imposed and constituted a substantial and exhorbitant burden and hindrance upon an agency or instrumentality of the United States Government, namely, said oil and gas leases, and the Government in the discharge of its duties and obligations as guardian of its said Indian wards, and respondent as lessee under said leases in the performance of its duties and obligations as such lessee; and further that such statutes and such taxes so imposed materially and substantially interfered with, hindered and impaired the usefulness and efficiency of such agencies or instrumentalities in serve ing the United States Government (R. 6.7, 30)

ARGUMENT and AUTHORITIES.

I.

A state has no power, in the absence of congressional consent, to levy a direct tax upon the functioning of a Federal agency or instrumentality.

It will be our purpose in this brief to consider this rule of Constitutional law in the light of the basic principles governing same, the limitations which have confined its application within safe and reasonable bounds, and the presently recognized status of the doctrine, particularly as related to the production of oil by a lessee under a departmental lease covering restricted wild tribes Indian lands. Discussion will also be had of the temporary extension of the doctrine to include net income resulting from the operations of a Federal instrumentality, and of the subsequent decisions of this Court holding that such extension is unwarranted and should no longer be upheld.

A. The Basic Constitutional Doctrine.

One of the necessary results flowing from our dual system of government is that neither government has the power to interfere with or encroach upon the other in the discharge of its government functions. This principle became established shortly after the formation of the Federal Union and the adoption of the United States Constitution. The leading early case is, of course, that of McCulloch v. Maryland, 4 Wheat, 316, 4 L. ed. 579. In holding that although the bank was subject to state taxes upon its real estate (ad valorem taxes) it could not be subjected to a state tax upon its operations as a Federal instrumentality, the court, speaking through Chief Justice Marshall, on pages 436-437, said:

"This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional."

In many later decisions this principle has been consistently applied and enforced, and it is only what the court has regarded as an unwarranted extension of the doctrine, namely, it application, at least one step further removed from the operations of the instrumentality, and to income derived from such operations, that has brought criticism. This resulted in the abrogation, not of the doctrine itself, or of its application to the functioning of a Federal instrumentality as such, but of such unwaranted extension, as we shall presently see. Other limitations of the doctrine, clearly distinguishable from the instant case, will also be noted.

In Western Union Tel. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067, this Court held invalid a state tax in so far as imposed on messages sent by public officers on business of the United States. We quote from the opinion as follows:

"As to the government messages, it is a tax by the state on the means employed by the Government of the United States to execute its constitutional powers and, therefore, void. It was so decided in McCulloch v. Maryland, 4 Wheat. 316, and has never been doubted since."

In Indian Motorcycle Co. v. United States, 283 U. S. 579, 75 L. ed. 1277, the court speaking through Mr. Justice VAN DEVANTER said on page 575:

"It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the states, and that the instrumentalities, means and operations whereby the states exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective spheres . and from the provisions of the Constitution which look to the maintenance of the dual system. Collector v. Day, (Buffington v. Day) 11 Wall. 113, 125, 127, 20 L. ed. * 122, 126, 127; Willcutts v, Bunn, 282 U. S. 216, 224, 225, ante, 304, 306, 71 A. L. R. 1260, 51 S. Ct. 125. Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute. McCulloch. v. Marylandy 4 Wheat. 316, 430, 4 L. ed. 579, 607; United States v. Baltimore & O. R. Co., 17 Wall. 322, 327, 21 L. ed. 597, 599; Johnson v. Maryland, 254 U. S. 51, 55, 56, 65 L. ed. 126, 128, 129, 41 S. Ct. 16; Gillespie v. Oklahoma, 257 U. S. 501, 505, 66 L. ed. 338, 340, 42 S. Ct. 171; Crandall v. Nevada, 6 Wall. 35, 44-46, 18 L. ed. 745, 747, 748."

In the case of Johnson v. Maryland, 254 U. S. 51; 65 L. ed. 126, it was held that a state gould not require an employee of the Post Office Department to obtain a license by submitting to an examination and paying a fee of \$3.00 in order to drive a truck in the performance of his duties. This amount seems very small, but the principle involved is inviolable. The court, speaking through Mr. Justice Holmes, said:

With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since M'Culloch y Maxyland, 4 Wheat. 316, 4 L. ed. 579. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the states to touch, in that way, at least, the instrumentalities of the United States (4 Wheat. 429, 430) and that is the law today. Farmers & M. Sav. Bank v. Minnesota, 232 U. S. 516, 525, 526, 58.L. ed. 706, 711, 34 Sup. Ct. Rep. 354."

- Where the national government acts through a certain instrumentality in the performance of duties and obligations devolving upon it that is to say, in the performance of governmental functions, such an agency becomes a Federal instrumentality. An example of this is found in the case of Pittman v. Home Owners Loan Corp., 308 U. S. 21, 84 L. ed. 11, which denied to the State of Maryland the asserted right to impose upon said corporation a tax of ten cents for every \$100.00 as a prerequisite to the recording of its mortgages. The case holds that Congress has the power not only to create a corporation to facilitate the performance of governmental functions through it, but also to protect the operations thus validly authorized. The court, speaking through Mr. Chief Justice Hughes, on pages 32-33 said:
 - which the national government lawfully acts must be regarded as governmental functions and as entitled to whatever immunity attaches to those functions when performed by the government itself through its departments. M'Culloch v. Maryland, 4 Wheat. 316, 421; 422, 4 L. ed. 579, 605; Smith v. Kansas City Title & T. Co., 255 U. S. 180, 208, 209, 65 L. ed. 577, 588 589, 41 S. Ct. 243; Graves v. New York, supra. Congress has not only the

power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations thus validly authorized. 'A power to create implies a power to preserve.' M'Culloch v. Maryland, supra 24 Wheat., p. 426, 4 L. ed. 606)."

Congress in its broad plan to encourage and assist home ownership by the citizens of our mation might, instead of creating and utilizing a national corporation, have conducted these activities through a corporation or corporations organized by a state, in which latter event such agencies would have become Federal instrumentalities. So, in the development and operation of the lands of its Indian wards for mineral purposes, the United States Government has duties and obligations to perform. These are governmental functions, and have been so held since the very beginning. · Conceivably Congress might have created its own corporation to prospect for oil and gas on said Indian lands, to drill wells, and to produce and market the products. Instead, it elected to do these things through corporations or other operators assumed to be particularly skilled and equipped for this work. The fact that it constituted these lessees as agents or instrumentalities to do the same thing that it might have done through a nationally organized cord poration does not change the legal status. Such lessees, to the extent that they are engaged in the production of oil and gas under departmental leases covering restricted Indian lands, are and have uniformly been held to be Federal instrumentalities.

The central government may and does exercise its powers and functions through many agencies and instrumentalities—sometimes through corporations existing under Federal law, and sometimes through those organized understate law. Except for the utilization of existing agencies, chick your a

Congress would be forced to the deplorable necessity of creating a large number of new corporations to perform such functions. The test in cases such as the present is, not the source of incorporation, but whether or not the taxes in question are sought to be enforced against the operations of a Federal instrumentality. This principle has been applied so many times and over such a period of time to operations by a departmental oil and gas lessee engaged in the production of oil and gas from restricted Indian lands, that we feel that we may turn our attention to cases involving this precise situation.

B. The Departmental Lessee Under a Restricted Indian Lease Is, in the Operation Thereof, a Federal Instrumentality.

Since the United States Government has plenary powers over restricted Indians and their lands, and exercises supervision, jurisdiction and control over oil and gas mining leases executed pursuant to its authorization and covering such restricted lands, it necessarily follows that the lessee engaged in the operation of such a lease is a federal agency or instrumentality. This is true both under the decisions and as a necessary consequence of the inherent nature of such an activity.

1. Both the Supreme Court of the United States and the Oklahoma Supreme Court hold that the oil and gas lessee under a Departmental lease covering restricted Indian lands is a Federal instrumentality.

The case of Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522, 60 L. ed. 779, dealt with an attempted tax by the State of Oklahoma imposed upon an asssignment of an oil and gas lease covering restricted

lands in Osage Nation. It was held that this amounted to a burden placed upon a Federal agency or instrumentality and was therefore void. The case follows the reasoning of and cites in support of the decision, the case of Choctaw, O. & G. R. Co. v. Harrison, infro, and holds that such a tax cannot be enforced for the reason that it is an attempt to tax an instrumentality through which the United States was performing its duties to the Indians. (See page 530.)

The Oklahoma Supreme Court in the case of Large Oil Co. v. Howard, 63 Okl. 143, 163 Pac. 537, decided in 1917, upheld the Oklahoma gross production tax as to oil produced under a restricted Indian lease, upon the theory that this did not impose a tax upon the operations of the lessee, or upon its right to engage in or continue its business as such lessee, but only upon the commodity which it thus produced, and which tax was imposed in full and in lieu of, or as a substitute for other taxes which might be levied. This is the same argument which is made by our opponents, and also advanced by the Solicitor General in the amicus curiae brief some thirty years later! The decision of the Oklahoma Supreme Court was reversed by this Court. Large Oil Co. v. Howard, 248 U. S. 549, 63 L. ed. 416. This Court had previously held invalid such a tax, applying the same principle in the memorandum decision of the case of Howard v. Gypey Oil Co., 247 U. S. 503, 62 L. ed. 1239, at the preceding term.

When, in 1935, the Oklahoma Supreme Court again considered this matter, the fact that an oil and gas lessee under a restricted Indian lease was a governmental instrumentality was held to be no longer debatable. In holding that such a lease is a Federal instrumentality not subject to state taxation (as to imposition of the proration tax in

that case) the Court, speaking through Justice Welch, in the case of Barnsdall Refineries, Inc., v. Oklahoma Tax Commission, 171 Okl. 145, 41 P. (2d) 918, said:

"It is now beyond question that the oil leases held by the plaintiffs are governmental instrumentalities, and that the State of Oklahoma, may not impose any tax thereon without the consent of the United States Government, Carter Oil Company v. Oklahoma Tax Commission, 166 Okl. 1, 25 P. (2d) 1092; Choctaw, O. & G. R. Co. v. Harrison, 235 U. S. 292, 35 S. Ct. 27, 59 L. ed. 234; Indian Territory Illuminating Oil Co. v. . Oklahoma, 240 U. S. 522, 36 S. Ct. 453, 60 L. ed. 779; Howard v. Oklahoma Oil Company, 247 U. S. 503, 38 S. Ct. 426, 62 L. ed. 1239; Large Oil Co. v. Howard, 248 U. S. 549, 39 S. Ct. 183, 63 L. ed. 416; Gillespie v. Okla- • homa, 257 U.S. 501, 42 S. Ct. 171, 66 L. ed. 338; Jaybird Mining Co. v. Weir. 271 U. S. 609, 46 S. Ct. 592, 70 A ed. 1112. And it seems to be conceded by the defendand that this tax could not be levied and collected without the consent of the United States Government."

That case was appealed to the Supreme Court of the United States and affirmed in an opinion delivered by Mr. Justice Stone, fully upholding the decision of the Oklahoma Supreme Court.

-Oklahoma, ex ret. v. Barnsdall Refineries, Inc., 296 U. S. 521, 80 L. ed. 366:

In at least two cases involving the production of hard minerals by lessees under leases covering restricted Indian lands the same principle was applied, it being held that such lessees were, in the operations conducted under the leases, Federal agencies or instrumentalities.

-Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292, 59 L. ed. 234;

Jaybird Mining Co. v. Weir, 271 U. S. 609, 70 L. ed. 1112.

2. A marked degree of supervision and control over the operations under such Departmental leases is retained.

Not only do the decisions consistently hold that the lessees operating under such departmental oil and gas leases are Federal instrumentalities but the Acts of Congress, the leases themselves, and the Rules and Regulations promulgated by the Secretary of the Interior confirm this relationship in fact. That such leases are Federal instrumentalities is not a mere legal fiction; the existent relationship is real and practical.

As illustrative of provisions of the leases (R 11-19) disclosing supervision and control retained over the lessee's operations we quot therefrom as follows:

- "3(f) * * * to carry out at the expense of the lessee all reasonable orders and requirements of the oil and gas supervisor relative to prevention of waste, and preservation of the property and the health and safety of workmen;
- any and all regulations. To abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases: Provided. That no regulations hereafter approved shall effect a change in rate of royalty or annual rental herein specified without the written consent of the parties to this lease.
- "10. Drilling and Producing Restrictions. It is covenanted and agreed that the Secretary of the Interior may impose restrictions as to time or times for the drilling of wells and as to the production from any well or wells drilled when in his judgment such action may be necessary or proper for the protection of the natural resources of the leased land and the interests of the Indian lessor; and in the exercise of his judg-

ment the Secretary may take into consideration, among other things Federal laws, State laws, or regulations by competent Federal or State authorities or lawful agreements among operators regulating either drilling or production, or both

"13. Conservation. The lessee in consideration of the rights herein granted agrees to abide by the provisions of any Act of Congress, or any order or regulation prescribed pursuant thereto, relating to the conservation, production, or marketing of oil, gas, or other hydrocarbon substances."

Said leases were, of course, executed pursuant to the provisions of the General Allotment Act (24 Stat. 388) and of acts amendatory thereof, and of the Act of March 3, 1909, (35 Stat. 781, 783). An elaborate system of supervision and control by the Government, of the operations of such a departmental oil and gas lease has been provided and is maintained. The Court is referred to Title 25, 189.1-189.33, of the Code of Federal Regulations (hereafter cited as "CFR") for general coverage of the "Leasing of Certain Restricted Allotted Indian Lands for Mining," the source therefor being stated in footnote to 189.1. In 189.24 it is provided:

"Lessees will be required to carry out and observe the operating regulations now or hereafter in force governing oil and gas operations on restricted Indian lands."

Pursuant to statutory authority which we deem unnecessary to detail, but which is set out in the foot-note to 30 CFR 221.1, many rules and regulations governing the lessee's operations of an oil lease covering restricted Indian lands have been promulgated. Reference is had to Title 30 CFR 221.1-221.56 for greater particularity. The regulations are administered (except as to lands within naval

petroleum reserves) under the Director of the Geological Survey. Among other provisions in the Regulations are those providing that the Supervisor or his representatives may exercise general supervision and inspection of lessee's operations (2215 (a)); may require correction in a manner to be approved by him of any condition which is causing or likely to cause damage to any formation containing oil, gas, etc.; require vertical drilling when necessary to protect interests in other properties, etc. (221.5 (e)); fix percentages of potential capacities (221.5 (f)); approve well-spacing and well-casing programs (221.5 (g)); and suspend and shut down operations under certain conditions (221.5 (k)). Before commencing any operations the lessee must submit the proposed program and obtain the consent and approval of the supervisor; likewise approval must be first obtained as to many other operations in connection with the development and operation of the land for oil and gas purposes, ak, for example, drilling, re-drilling, plugging back, shooting the well, acidizing, using vacuum, etc. (221.9).

Provisions too numerous to delineate are set out in succeeding subdivisions, but the above will illustrate the direct and effective supervision and control exercised over the operations of a departmental oil and gas lessee, and clearly distinguishes this situation from that existing under the ordinary commercial oil and gas lease.

3. Petitioner impliedly concedes that respondent is a Federal instrumentality.

We have perhaps devoted more space than necessary to the discussion of the relationship brought about by the departmental leases in question, since the petitioner apparently concedes that respondent was a Federal instrumentality in the operation of its leases. On page 41 of petitioner's brief, in speaking of the Mountain Producers Corp. case (infra), it is said:

Producers case overruled these cases on the proposition that an entity occupying the position here occupied by the appellees is not a Federal instrumentality."

In spite of this apparent-concession we wished to have the true existent relationship clearly before the Court, for it is this which unmistakably differentiates the instant case from cases relied upon by our opponents, as we shall presently show. We trust, therefore, that we have not tried the patience of the Court too far by going into this phase of the case as fully as we have.

C. A State Cannot, in the Absence of Congressional Permission, Place a Tax Upon the Operations of a Restricted Indian Lease, Measured by the Production of Oil Therefrom.

Having established the fact that the operator of a departmental oil and gas lease covering restricted Indian lands is a frue Federal instrumentality, the inescapable result is that the state cannot impose a tax upon the operation thereof without congressional consent. The doctrine in its broadest concept has already been presented, but we wish now to show its application to departmental leases (both solid minerals and oil and gas) covering restricted Indian lands.

In Chactaw D. c. G. R. Co. v. Harrison, supra, decided in 1914, the State of Oklahoma was held powerless to impose a gross production tax upon coal mined under a departmental leave covering restricted Indian and. The same result was reached in 1926 relative to the production of ore from restricted property of a Quapaw Indian, leaved by the

Government for development in the case of Jaybird: Mining Co. v. Weir, 271 U. S. 609, 70 L. ed. 1112. We quote from the opinion by Mr. Justice Butler on pages 612-613 as follows:

"The Quanaw Indians are under the guardianship of the United States. The land and Indian owners are bound by restrictions specified in the patent and the acts referred to. It is the duty and established policy of the Government to protect these dependents in respect of their property. The restrictions imposed are in furtherance of that policy. United States v. Noble, 237 U. S. 74, 59 L. ed. 844, 35 Sup. Ct. Rep. 532; Goodrum v. Buffalo, 89 C. C. A. 525, 162 Fed. 817. The lessee is an agency or instrumentality employed by the Government for the development and use of the restricted land and to mine ores therefrom for the benefit of its-Indian wards. Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292, 59 L. ed. 234, 35 Sup. Ct. Rep. 27. It is elementary that the Federal Government in all its activities is independent of state control. This rule is broadly applied. And without congressional consent no Federal agency or instrumentality can be taxed by state authority. 'With regard to taxation, no matter , how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579. Johnson v. Maryland, 254 U. S. 51, 55, 65 L. ed. 126, 128, 41 Sup. Ct. Rep. 16. And see Farmers & M. Bankey. Minnesota, 232 U. S. 516, 58 L. ed. 706, 34 Sup. Ct. Rep. 354; Choctaw O. & G. R. Co. v. Harrison, supra; Gillespie v. Oklahoma, 257 U. S. 501, 505, 66 L. ed. 338, 340, 42 Sup. Ct. Rev. 171."

The principle of these cases, of course, applied to mining operations for oil and gas as well as for solid minerals, and the case of *Indian Territory Illuminating Oil Co.* v. Oklahoma, supra, wherein this Court held void an at-

tempt by Oklahoma to impose a tax upon an assignment of an oil lease covering restricted lands in Osage Nation, has already been called to the Court's attention.

Other cases dealt with the state gross production tax as applied to the production of oil, the same principle being announced.

-Howard v. Gypsy Oil Co., supra; Large Oil Co. v. Howard, supra.

In Oklahoma, ex rel., v. Barnsdall Refineries, supra, the much smaller proration tax of 1/8 cent per barrel was held void as to oil produced under departmental lease from lands in the Osage Nation, for the reason that Congress had not-consented to the imposition of the tax. There have been no changes, either in this Court or in the Supreme Court of Oklahoma, relative to the principles announced in these decisions as applicable to the production of oil and gas from restricted Indian lands, and said decisions reflect the law as it now exists in both courts.

1. The tax in question is a real burden.

In petitioner's brief, and also in the amicus curiae brief filed by the Solicitor General it is argued that the gross production taxes in question constitute no real burden, and should, in effect, be ignored. For example, it is argued that the same rental and royalty payments prevail regardless of whether the gross production taxes are enforceable, and from this the inference is sought to be drawn that the tax constitutes no burden on the Federal instrumentality. This completely ignores the fact that a lease which is free from this state tax of 5% of the value of the oil produced is more attractive and brings more in the way of a bonus at competitive bidding than one which is subject to such tax. And

the United States, or its governmental agencies, receives the added income for the benefit of its Indian wards.

In Heiner v. Colonial Trust Co., 275 U. S. 232, 72 L. ed., 256, wherein it was held that income resulting from the operations of a restricted oil lease is subject to United States, income taxes, the Court had occasion to consider the nature of such a lease and of the principles applicable thereto. We quote from the opinion on page 234 as follows:

government has chosen to use in fulfilling its task of developing to the fullest the lands and resources of its wards, and a state may not by taxation lessen the attractiveness of leases for such purpose. Gillespie v. Oklahoma, 257 U. S. 501, 66 L. ed. 338, 42 Sup. Ct. Rep. 171; Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522, 60 L. ed. 779, 36 Sup. Ct. Rep. 453; and see Choctaw O. & G. R. Co. y. Harrison, 235 U. S. 292, 59 L. ed. 234, 35 Sup. Ct. Rep. 27; Jaybird Min. Co. v. Weir, 271 U. S. 609, 70 L. ed. 1112, 46 Sup. Ct. Rep. 592.

Unquestionably the United States, as guardian and trustee for its Indian wards, has a direct financial interest in upholding the immunity of its instrumentality from this tax. Far greater, however, is its interest that its agency through which it performs certain governmental functions be unhampered and free from any burden or interference in the performance of those functions.

It is entirely a false premise to say that the taxes in question do not constitute a burden on operations. Under the statement of the case it appears that the taxes for the two months for which the present suit was brought amount to more than \$3,900.00. It is well known that in the operation of many leases, that amount, or the amounts applicable to the leases in question, could spell the difference between profit-

able and unprofitable operation, and so might force an instrumentality of the government to cease functioning. Such a result would certainly not be tolerated by the courts in so far as affects the National Government; also it would entail serious loss and hardship upon the instrumentality itself.

It is the purest sophistry for petitioner to argue that the taxes involved in the present action do not constitute a burden upon the oil and gas leases in question and upon the operations of the lessee. If, as was held by both the Oklahoma Supreme Court and the United States Supreme Court, the proration tax of 1/8 cent per barrel was such a burden upon a federal instrumentality as to result in the tax being declared void (Barnsdall Refineries, Inc., v. Oklahoma Tax Commission, supra; Oklahoma v. Barnsdall Refineries, Inc., supra), then clearly the same tax of 1/8 cent per barrel plus an additional tax of five per centum of the value of the oil is likewise such a burden as to result in such taxes being declared unconstitutional!

In view of the actual and substantial financial burden flowing from an enforcement of these gross production and proration taxes, and in further consideration of the fact that not only is this admitted by the demurrer of petitioner, but also that petitioner expressly stated in the Oklahoma Supreme Court that the amount of the taxes pleaded by respondent was correct, in order to have that court render an appealable judgment, it is now absurd for petitioner to argue that no burden results from an enforcement of such taxes. This is simply contrary not only to the pleadings, but also the known and admitted facts.

2. The Oklahoma Legislature has interpreted the tax exemption as existent.

Our opponents have called attention to certain portions of the Oklahoma Gross Revenue Taxing. Act, but have failed to include a section which we consider very pertinent as containing a legislative interpretation of the Act, namely, that the Legislature recognizes the fact that, except as to certain Indian lands as to which Congress has given its consent to the levy of the tax, oil produced from restricted Indian lands is exempt from the gross production taxes.

The section to which we refer is 68-832*, O. S. A., which became law on its approval April 2, 1925, and which provides for refund (among other reasons) where gross production taxes are paid "in error on account of the production being derived from restricted Indian lands and therefore exempt from taxation." This provision was not exclusive, but was additional to the statutory procedure adopted by the respondent in the instant case, namely, payment under protest and suit to recover back pursuant to 68-1475, O. S. A.

Oklahoma had had a gross production law since 1910 (R. E. 1910, Sec. 7464, and later acts), and prior to the passage of 68-832, supra, this Court had held that production of oil, gas and solid minerals from restricted lands of Indians, under departmental leases, was not subject to taxation by the state. The Legislature, therefore, evidently

^{*68-832,} O. S. A., is as follows: "In all cases of over-payment, duplicate payment or payment made in error on account of the production being derived from restricted Indum lands and therefore exempt from taration, the State Auditor, by and with the approval of the State Board of Equalization, after an audit by the State Examiner and Inspector, is authorized to refund any such overpaid, duplicate or erroneously hald gross production taxes out of any gross production tax funds in his hands from the same county from which the original tax was derived and not apportioned to the State Treasurer to be distributed as provided by 0 law. Laws 1925, ch. 20, p. 21, Sec. 3."

passed Section 68-S32 in 1925 in the light of these decisions, and thereby clearly gave a legislative interpretation that, apart from congressional consent, the Oklahoma gross production taxing statutes had no application to oil produced from restricted Indian lands. This follows the recognized rule that the intention of the Legislature is to be ascertained by all aids available.

-United States v. Goldenberg, 168 U. S. 95, 42 L. ed. 394;

Cases cited in 59 C. J. 948, et seq.

When, therefore, the Oklahoma Legislature passed its later gross production tax laws (Laws 1933, ch. 103, p. 202, Sec. 5; Laws 1935, p. 271, Sec. 1), with 68-832 on the statute books, it seems clear that these later acts are subject to the continued construction carried by 68-832.

D. Congress Has Not Waived the Immunity from Taxation.

It is clear from the many cases, supra, that in the absence of consent by Congress, or waiver of the immunity, a state has no power to impose a gross production tax upon the production of oil from restricted Indian lands. We will now consider the question of whether there has been any such waiver of immunity.

- 1. The fact that Congress has neither waived the immunity nor affirmatively withdrawn the subjectmatter from taxation is to be interpreted in the setting of the applicable legislation and the particular exaction.
- We do not contend that every piece of Indian land which is subject to restrictions is tax exempt. There are situations in which the immunity does not exist. Typical of this is the case where non-Indian lands, already on the state's tax

rolls and subject to taxation, are purchased with restricted Indian funds, and where Congress has placed restrictions on the lands so purchased. In such a case, unless Congress affirmatively acts to withdraw the lands from the tax rolls, by declaring them exempt, the implication is that it consents to the land remaining subject to taxation. The rationale for this result is that in this situation it would take some affirmative action to remove the lands from taxation, and where Congress passively remains silent this is interpreted as a permission for the taxation to continue.

In Shaw y. Gibson-Zahnister Oil Corp., 276 U. S. 575, 72 L. ed. 709, it appears that land which was subject to state taxation was purchased for a restricted Creek Indian from restricted funds. A restriction against alienation of the land was imposed by the Secretary of the Interior, pursuant to statutory authority. It was held that the land remained subject to state taxation, as was also the oil lease covering same.

The decision in the above case, written by Mr. Justice STONE, contains an interesting statement concerning certain government instrumentalities which will be held free from state taxation, the following language being used:

"What governmental instrumentalities will be held free from state taxation, though Congress has not expressly so provided, cannot be determined apart from the purpose and character of the legislation creating them. Metcalf v. Mitchell, 269 U. S. 514, 70 L. ed. 384, 46 Sup. Ct. Rep. 172. The end sought and the mode of attaining it adopted by Congress in the legislation providing for the welfare of the Indians by setting apart, by allotment or otherwise, tribal lands of the public domain, restricted for their benefit, led to the conclusion that those lands and the uses of them were so intimately connected with the performance of governmental func-

tions as clearly to require independence of all state control so complete that nothing short of an express declaration by Congress would have subjected them to state taxation.

"Governmental agencies similarly held to b empt are national banks, First Nat. Bank v. Hartford, 273 U. S. 548, 71 L. ed. 767, . . . A. L. R. . . . , 47 Sup. Ct. Rep. 462, bonds of the national government, Weston v. Charleston, 2 Pet. 449, 467, 7 L. ed. 481, 487; such were and still are the restricted allotted or tribal lands of the Indians; neither leases of those lands, Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U.S. 522, 60 L. ed. 779, 36 Sup. Ct. Rep. 453, nor the exploitation of the land by the lessee, Howard v. Gypsy Oil Co., 247 U. S. 503, 62 L. ed. 1239, 38 Sup. Ct. Rep. 426; Large Oil Co. v. Howard, 248 U. S. 549, 63 L.,ed. 416, 39-Sup. Ct. Rep. 183; Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292, 59 L. ed. 234, 35 Sup. Ct. Rep. 27; Jaybird Min. Co. v. Weir, 271 U. S. 609, 70 L. ed. 1112, 46 Sup. Ct. Rep. 592, nar his income from the lease, Gillespie v. Oklahoma, 257 U. S. 501, 66 L. ed. 338, 42 Sup! Ct. Rep. 171, may be taxed by the state."

It will be observed that of those examples enumerated which are held to be exempt from state taxation even though Congress has not expressly so provided, the law remains unchanged with one exception, namely, income resulting from the operation of a restricted lease. As to the functioning of the instrumentality itself, however, and specifically as to the production of oil by reason of the operations of such a Federal instrumentality, the law remains now, as it was then, that the state cannot burden same with taxes.

". Creek County v. Seber, 318 U. S. 705, 87 L. ed. 294, cited on page 30 of the Solicitor General's brief, is another case involving the continued liability of property to taxation where it had already been on the tax rolls." The case

is not at all contrary to our position, the same principle being applied as in Shaw v. Gibon Zahnister Oil Corp., supra.

In Mayo v. United States, 319 U.S. 44K 87 L. ed. 1504, the question was presented whether Florida could impose an inspection fee on account of fertilizer distributed by the Federal Government to farmers, as part of the soll-building program. It was contended on behalf of the state that since neither the United States Constitution nor any Federal statute exempted the United States from the payment of a reasonable fee, such a fee was valid. The Court held otherwise, even though Congress had not expressly prohibited the collection of the fee.

It is submitted that respondent, as a true instrumentality of the Government so far as the operation of the three leases in question is concerned, comes within the reasoning of this case.

2. Before an oil lessee, functioning as a Federal instrumentality under a departmental lease covering lands of restricted Indians, can be subjected to state taxation measured by the value of the oil produced, Congress must give its consent thereto.

The above principle is included in a number of the cases already presented, intimately connected with the propositions previously discussed; and to avoid redundancy the passages quoted will not be repeated here. See:

Choctaw O. & G. R. Co. v. Harrison;

I. T. I. O. Co. v. Oklahoma;

Oklahoma Tax Commission v. Barnsdall Ref., Inc.;

Howard.v. Gypsy Oil Co.;

Large Oil Co. v. Howard;

Jaybird Min. Co. v. Weir,

all supra.

In Maricopa County v. Valley National Bank, 318 U. S. 357, 87 L. ed. 834, it was held that even where Congress had consented to the imposition of a state tax upon a Federal instrumentality (the preferred stock of a National Bank held by the R. F. C. in that case), it could thereafter withdraw such consent. We quote from the opinion by Mr. Justice Douglas, discussing the effect of such Acts of Congress relating to Federal instrumentalities, as follows:

"It was conferred by Congress which has under the Constitution exclusive authority to determine whether and to what extent its instrumentalities, such as the Reconstruction Finance Corporation, shall be immune from state taxation.

"When Congress authorized the states to impose such taxation, it did no more than gratuitously grant them political power which they theretofore lacked. Its sovereign power to revoke the grant remained unimpaired, the grant of the privilege being only a declaration of legislative policy changeable at will."

That being true, it seems clear that where the consent has never been given in the first place, and where the tax is sought to be imposed upon the functioning of a true Federal instrumentality, the state is powerless to enforce the tax.

3. The fact that permissive acts were passed by Congress and waivers of the tax immunity were made as to the lands of certain other Indian tribes is strongly indicative that, apart from such permissive acts and waivers, the principle of immunity controls.

As has already been indicated, Congress has in certain particular instances given its consent to the imposition by a state of taxes on a government instrumentality. This was done as to oil produced from lands located in Osage Coun-

ty, Oklahoma, but the permission to impose the tax was limited to the gross production tax and therefore could not even by implication be extended to the much smaller excise or proration tax. (Oklahoma v. Basasdall Refineries, supra.) This waiver of immunity, as to oil produced from Osage County, Oklahoma, was granted by the Permissive Act of March 3, 1921 (41 Stats, at L. 1250).

In addition, Congress gave permission to Oklahoma to impose both the gross production tax and the excise or proration tax on oil produced from restricted lands of members of the Five Civilized Tribes, by act approved May 10, 1928 (45 Stats. at L. 496). As an example of the language employed in such permissive acts we quote Section 3 of the act last referred to, whereby Congress allowed such state taxes to be imposed upon all minerals, including oil and gas, produced from restricted allotted lands of members of the Five Civilized Tribes:

"Sec. 3. That all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full-blood Indian heirs or devisees of such lands, shall be subject to all state and Federal taxes of every kind and character the same as those produced from lands owned by other citizens of the State of Oklahoma; and the Secretary of the Interior is hereby authorized and directed to cause to be paid, from the individual Indian funds held under his supervision and control and belonging to the Indian owners of the lands, the tax or taxes so assessed against the royalty interest of the respective Indian owners in such oil, gas, and other mineral production."

A similar permissive act ullowing the imposition of the Oklahoma Gross Production Tax on oil produced from re-

stricted homestead allotted lands of the Kaw Indians was approved May 27, 1924 (43 Stats, at L. 176-177). However, Congress has never given its consent to the imposition either of the gross production tax or of the proration tax upon the production of oil from restricted lands of the Appele and Krowá Indians, and it follows that lessees under departmental leases covering those lands, as Federal Instrumentalities, are immune from taxes imposed upon them in the performance of their duties.

These permissive acts, expressly confined to the par ticular Indians and their lands embraced therein, have been passed from time to time covering a period of some 27 years. During all of that time the decisions of this Court have been to the effect that in the absence of such congressional consent the state is powerless to impose a tax of the. character in question upon the production of oil under such a departmental lease. Where the consent has been granted by appropriate Act of Congress it has been given effect by this Court; where Congress has remained silent and no consent has been given this Court has repeatedly declared that the attempted taxes were unconstitutional and void. Yet in the face of that record, our opponents now come forward with the absurd argument that Congress should be deemed impliedly to have given its consent with regard to the production of oil from Apache and Kiowa lands! There, is nothing-in the course adopted by Congress, in the administration by the Department of the Interior, or in the decisions of this Court to substantiate such a claim.

If the consent of Congress to the imposition of the tax had not been necessary, then what sense can we make out of the fact that permissive acts have been passed from time to time over such a long period of years, and made applicable to certain designated Indians? Are we to attribute

to Congress, and to many successive Congresses, the doing of such a vain and foolish thing? And are we to assume that this Court, in its long line of decisions, has overlooked this "implied consent" now being suggested by our opponents? Rather, it seems to us that plain common sense logic should prevail. The mere fact that Congress has granted its consent as to certain Indians, but not as to others, and that this differentiation has been recognized and give effect by this Court shows unmistakably that such an Act of Congress, affirmatively extending the permission to tax, is required before the state/can act. Unless this were so, the entire doctrine of the immunity of a Federal instrumentality from state taxation imposed upon its functioning might be swept away, for in each instance the claim would be made that Congress had given its "implied consent"!

(a) Such Valvers of Immunity Are Strictly Construed.

The waiver of immunity under discussion is an act of the sovereign. For the immunity here considered is that surrounding an instrumentality of the sovereign in the performance of its functions. Thus, the sovereign and the sovereign only, can waive the immunity. For that reason it is held that where such waivers are in fact made, they must be strictly construed. No extension by implication will be indulged in.

As well illustrating this principle, the case of Oklahoma, ex. rel., v. Barnsdall Refineries, Inc., supra, is again called to the attention of the Court. That case dealt with the right of the State of Oklahoma to impose the excise or proration tax of 1/8 of one cent per barrel upon oil produced under a restricted Osage lease. The gross production tax was not involved for the reason that Congress had, on March 3, 1921, passed an Act (41 Stats, at L. 1250) permitting the

state to impose the gross production tax on Osage land, but remaining silent as to the much smaller proration tax. The Oklahoma Tax Commission contended that since Congress had consented to the imposition of a tax upon the gross production of oil, the state could enforce the proration tax as, by implication, being within the terms of such consent. This contention was denied, both by the Oklahoma Supreme Court and this Court. On page 526 of this Court's opinion we find this language:

"Construing that consent with the strictness appropriate to the interpretation of a waiver of a defined tax immunity of the sovereign, we think the conclusion of the state court was right."

(b) The Authorities Cited by Petitioner Are Not in Point.

On page 43 of petitioner's brief we find cited the case of British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159, 81 L. ed. 95, accompanied by the remarkable statement that by said case "the correctness of our contentions is established." An examination of the case shows that it is not in point, except as affording another example of an Act of Congress giving permission to states to impose taxes on production of oil from certain Indian lands therein specified: The Congressional Act in question consented to the taxes only upon "unallotted lands on Indian reservations" (other than lands of the Eive Civilized Tribes and Osage Reservation), but on no other land. The oil in the British-American case was produced from lands of the Blackfeet Indians in Montana, under a lease authorized by the tribal council and approved by the Secretary of the Interior. Trust patents (carrying surface rights only) had been issued for the benefit of the several Indian allottees, and because of this the oil producer contended that

these were not "unallotted" lands (as to which Congress had consented to the taxes); but had been allotted, and that accordingly the consent of Congress to the imposition of the tax did not apply. The fault with this reasoning was that under the Act and under the trust patents there was "a reservation for the bine fit of the tribe of all minerals, including oil and gas, in or under the allotted land," by reason whereof this Court held that so far as the mineral interest (oil and gas) covered by the leases was concerned "it is tribal land, and is unallotted" (pages 161, 164, 165 of the opinion). This meant that the consent of Congress to the imposition of the tax had been given as to these "unallotted" Blackfeet lands. The facts are brought out in greater detail in the case below, 101 Mont. 293, 54 Pac. (2d) 129.

The facts are obviously dissimilar to those of the instant case, and the Act of May 29, 1924, has no application here. For in the case of the Apache and Kiowa Indians there was no reservation to the tribes, either by Act of Congress or in the trust patents, of oil or gas or other mineral interests. The lands involved in the instant case had been allotted in severalty and trust patents issued therefor. So that as to the lands with which we are here concerned, they were "allotted" lands, both as to surface and as to minerals, and could not possibly be affected by the Act relating to "unallotted lands on Indian reservations" which was held to apply to the Blacklett Indians on their reservation in Montana.

The other case refled upon by petitioner in support of its claim that Congress has consented to the state's imposition of the tax in question is that of Carter Oil Co. v. Oklahoma Tax Commission, 166 Okl. 1, 25 P. (2d) 1092, cited on page 43 of petitioner's brief. That case is as far afield.

in sustaining petitioner's contentions as is the decision last, above discussed. A simply holds that under the Act of May 10, 1928 (45 Stats, at L. 495), giving Congressional consent to the imposition of state taxes on oil and gas, etc., produced from restricted allotted lands of producers of the Five Civilized Tribes, gross production taxes on oil produced from lands of a member of one of said five tribes are valid and enforceable.

The decision contains an admirable statement by Justice Welch relative to the required consent for the imposition of such a tax upon an instrumentality of government. We quote from the opinion on page 1094 of the Pacific Reporter as follows:

"It is clear that the rule is that the federal government and the state government must be each permitted to function through its proper agencies or instrumentalities without undue interference or hindrance from the other. And in keeping with that principle it is reasoned in the decisions above cited that a federal tax imposed upon a state instrumentality may unduly burden that instrumentality, and that a state tax imposed on a federal instrumentality may unduly burden: the same, and therefore that neither federal nor state tax should be permitted to be imposed upon an agency or instrumentality of the other government without the consent of the other government. In Jaybird Mining Co. v. Weir, 271 U. S. 609, 46 S. Ct. 592, 593, 70 L. ed. 1112, it was held that, without congressional consent, no federal agency or instrumentality can be taxed by state authority.'. We conclude that it is aqually clear. that such a tax might be lawfully imposed by and with proper consent." (Emphasis by the Court.)

Thus it will be seen that both the cases cited by Petitioner on this proposition missed the mark. We are pleased to observe that the Solicitor General did not cite these cases.

TI.

The immunity of a Federal instrumentality from State taxation is not extended so as to exempt private property from ad valorem taxes.

It is pointed out that private property of a Federal instrumentality is subject to ad valorem taxes imposed by a state, and from this it is argued that the gross production tax, levied in lieu of ad valorem taxes as to equipment in and about a producing lease, should be sustained. It is a clear case of non sequitur.

It is, of course, well established that the private property of a Federal instrumentality may be subjected to the state ad valorem tax, even though such private property is employed in carrying out the duties and obligations of such instrumentality.

-Susquehanna Power Co. v. State Tax Commission, 283 U. S. 291, 75 L. ed. 1042.

Applying this principle, this Court held in Taber v. Indian Territory Illuminating Oil Co., 300 U. S. 1, 81 L. ed. 463, that the state could levy an ad valorem tax upon property of a lessee used in operations under a lease covering Indian lands; also that the oil produced by the lessee of restricted Indian lands, after being commingled with oil from other sources, is subject to unaid valorem tax. Indian Ty. Illuminating Oil Co. v. Board of Equalization, 228 U. S. 325, 77 12 ed. 812. But this does not at all mean that the state can lay a tax upon the production of the oil, for that would constitute a tax upon the functioning of a Federal instrumentality, which is permissible only with the consent of Congress. This very distinction is emphasized in the two cases last cited.

The argument has been advanced that since Oklahoma has the right to levy an ad valorem tax on equipment around a lease, it can impose a gross production tax upon the functioning of a Federal instrumentality in Tieu thereof. This begs the question. Just because a state might legally eyv a tax within constitutional limits does not give it the power to levy an "in lieu," but illegal tax, beyond constitutional limits, even though in an equivalent amount. If it could do this, then it would be an easy matter to circumvent the Constitution. For example, in order to override the decisions of this Court declaring that a gross production tax upon the production of oil by a lessee from restricted Indian land is void, all that would be necessary (under this contention) would be for the state legislature to declare that such unconstitutional tax was in lieu of some other tax that the state might legally have levied. The absurdity of the argument is apparent! And yet, is not that in effect what petitioner is asking this Court to hold? This contention on, behalf of petitioner is effectively answered in the case of James v. Dravo Construction Co., 302 U. S. 134, 82 L. ed. 155, in the following language, found at page 158:

"But if the tax as actually laid upon the gross receipts placed a direct burden upon the Federal Government so as to interfere with the performance of its functions, it could not be saved because it was in lieu of a tax upon property or was so characterized."

The real nature of such a gross production tax levied upon products mined was considered and declared by this Court in Choctaw, O. & G. R. Co. v. Harrison, supra. In that case the contention was made on behalf of the State of Oklahoma that its gross production tax on coal dug from mines on lands of Choctaw and Chickasaw Indians was really a property tax, and this contention was upheld by the

Oklahoma Supreme Court. This Court, however, held that it was the real nature of the tax which counted, and not what some legislature might call it. We quote from the opinion by Mr. Justice McReynolds as follows:

Neither state courts nor legislatures, by giving a tax a particular name, or by the use of some form of words; can take away our duty to consider its real nature and effect. Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638.

"The requirement is not on account of property owned on a given day, as is the general custom where ad valorem taxes are provided for, and as the Oklahoma laws require; but the manifest purpose is to reach all sales and secure a certain percentage thereof—a method commonly pursued in respect of license and occupation taxes. Pullman Co. v. Knott (decided at the present term (235 U.S. 23, dete, 105, 35 Sup. Ct. Rep 2)).

"A tax upon a merchant's, manufacturer's, or miner's gross sales is not the same thing as one on his stock treated as property. Cooley, Taxn., 3d ed., p. 1095. The former is upon his business. In effect, the Oklahoma act prescribes an occupation (ax (Ohio Tax Cases, 232 U. S. 576, 592, 58 L. ed. 738, 745, 34 Sup. Ct. Rep. 372); and, accepting as true the allegations of appellant's bill, we think it cannot lawfully be subjected thereto."

a gross production tax, measured by the value of the product mined, is a privilege or occupational tax, and neither an expression of a state court for the arguments of our opponents can change its inherent nature.

It is further argued that under 68-821 O. S. A. the gross production tax may be raised or lowered to make it

Conform to what the ad valorem taxes would have been on . the property of the producer subject to taxation in the district or districts where situated, (Brief of Solicitor General, pp. 9, 25.) These intricate provisions could not give the stamp of validity to an otherwise unconstitutional law. Nor would they deprive a taxpayer of the rights afforded him by the recognized statutory procedure of protesting the exacted payment of illegal taxes, and of suing to recover same—a proceeding recognized in cases too numerous now to be questioned. (See 68-1475 O. S. A., as set out in Appendix II hereto.) Furthermore, the suggested provisions of 68-821 are inapplicable to the situation here, and do not afford an adequate relief . A reference to the statute in question (see Solicitor General's brief, pp. 44-45) shows that in the attempted equalization, there would be taken into consideration, not just the property of the producer on the particular lease from which the oil is being produced, but all producer's property in the "district or districts," and also the value of oil, gas and mineral leases, etc., machinery and equipment around wells or mines, the value of the oil, gas, etc., produced, and other elements of value. This last alone shows that these cumbersome provisions are inapplicable to the situation presented here. And if they were, they would themselves be unconstitutional, for they involve doing the very thing which the courts have repeatedly said could not be done, namely, basing a tax upon the production of oil from lands of a restricted Indian, measured (in part) by the value of the oil so produced. This would amount to no more than doing circuitously what the courts declare cannot be done directly.

The provisions discussed above are by no means new. They have been on the Oklahoma statute books at least since the year 1916. (Session Laws 1916, p. 105-106; S. L.

1933, p. 204, S. L. 1935, p. 273.) Said provision is noted in the case of Large Off Co. v. Howard, supra, (see 1 col. of p. 540 of Pacific Reporter) also decided by this Court, supra. Nowhere has it ever been held that an attempt to get relief under this inapplicable procedure is a prerequisite to a Federal instrumentality asserting, under the generally recognized statutory provisions, its immunity from a void tax:

Turning now to Alward v. Johnson, 282 U. S. 509, 75 L. ed. 496, (petitioner's brief, p. 21) that case simply upheld the right of California to lay a tax/upon the property of one who, under contract with the Government, was engaged (among other things) in carrying the mails. A provision of the state constitution required the payment by a company operating trucks for transporting property to pay a tax upon its franchises, trucks, equipment, etc., equal to 5% of its gross receipts. The Supreme Court of California held (a) that the truck company was not a Federal agency; and, (b) that the tax in question was a property tax (p. 513). This Court affirmed. Apparently the conclusion reached by the court was that the tax was really levied upon the property of the trucking company (franchises, trucks; equipment, etc.) although gross receipts were taken as the measuring rod. The court in effect accepted Care fornia's determination that this was a property tax, and held that the fact that such property was used in carrying the mails did not spell immunity for it. On page 514 it is said:

"Nor do we think petitioner's property was entitled to exemption from state taxation because used in connection with the transportation of the mails."

This is quite different from levying a tax directly upon the operations of a Federal instrumentally. The disfinction is exemplified in the later case of Indian Territory Illuminating Oil/Co. v. Bland of Equalization, supra. In holding that the oil after being produced and commingled with other oil, was subject to a property tax, although the privilege of extracting it could not be taxed by the state, the court through Mr. Chief Justice Hughes said:

mental instrumentality inhered in its operations as such, and being for the protection of the Government in its function extended no further than was necessary for that purpose. The holding of the oil in question, which had been segregated and withdrawn from the restricted lands as petitioner's exclusive property, awaiting disposition at petitioner's pleasure, was for its sole advantage and cannot be said to be so identified with its operations as a governmental instrumentality as to entitle it to exemption from the general property taxes imposed by the state in return for the protection the state afforded. With respect to these taxes, this oil was in no different case from that of the other oil of petitioner with which it was commingled."

Still later, this Court in Taber v. I. T. I. O. Co., supra, again distinguished between a state tax upon property of an agent of the Government and one imposing a direct burden on its operations as such instrumentality. In holding that the equipment in and about a producing oil lease covering restricted Indian land was subject to the Oklahoma advalorem tax the court, again speaking through Mr. Chief Justice Hughes, said:

"Our decisions distinguish between a non-discriminatory tax upon the property of an agent of government and one which imposes a direct burden upon the exertion of governmental powers. In the former case where there is only a remote, if any, influence upon the exercise of governmental functions, we have held that a non-discriminator, ad valorem tax is valid, although the property is und in the operations of the governmental agency."

It was recognized, of course, that the gross production tax could not be enforced by the state, upon the production of oil from these restricted Indian lands; for if the gross production tax had been applicable, the equipment in and about the producing lease would, under the Oklahoma law, have been exempt from the ad valorem tax. It is also interesting to note that in support of the recognized distinction between the taxation of the functioning of a Federal instrumentality and the taxation of its property used in and about its operations, the case of Alward v. Johnson, supra, is cited. (See p. 4 of the opinion.)

The case of James v. Dravo Cont'g Co., supra, was one which dealt with an independent contractor, as will be presently noted, but the court had occasion to consider the difference between taxation of property of Federal agencies and taxation of their operations. On page 153 of the opinion the court called attention to the distinction between a tax laid directly upon a Government contract or instrumentality, and a tax upon the property employed upon such an instrumentality, saying:

"Many years ago the court recognized and enforced the distinction between a tax laid directly upon a government contract or instrumentality of the United States and a tax upon the property employed by an agent or contractor in performance of services for the United States. Taxation of the agency is taxation of the seans; taxation of the property of the agent is not always, or generally taxation of the means. Thompson v. Union P. R. Co., 9 Wall. 579, 591, 19 L. ed. 792, 798."

And the court quotes from Union P. R. Co. v. Peniston, 18 Wall. 5, 33, 36, 21 L. ed. 787, 792, 793, in part as follows:

"It is, therefore, manifest that exemption of Federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers."

An independent contractor is not a true Federal instrumentality and hence the principle of immunity has no application.

A number of cases have been cited wherein this Court has sustained various state taxes upon parties having dealings with the Government, but upon examination it will be found that such parties were not true Federal instrumentalities but were independent contractors. We have been unable to find a single case in which this Court has upheld a state tax levied directly upon the operations of a true Federal instrumentality, unless supported by congressional consent.

In a former section of this brief, at the risk of being tedious, we presented decisions and pointed out pertinent facts showing that respondent in this case does not occupy the position of an independent contractor with the Government, but is a real Ederal instrumentality. It is not simply dealing with the Government as a contractor; the United States is performing certain functions through it. This distinction should be kept/in mind at all times, and clearly

differentiates the situation here from these independent contractor cases cited by petitioner, some of which will now be taken up and considered.

The case of James v. Dravo Cont'g. Co., supra, has already been mentioned. It presented the question of the constitutional validity of a state tax imposed upon gross receipts of a contractor under contracts with the United States. The case is not in point as relating to a state tax laid upon the functioning of a Federal instrumentality. This is clearly brought out on page 149 as follows:

"The tax is not laid upon an instrumentality of the Government. M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Gillespie v. Oklahoma, 257 U. S. 501, 66 L. ed. 338, 42 S. Ct. 471; Federal Land Bank v. Crosland, 261 U. S. 374, 67 L. ed. 703, 43 S. Ct. 385, 29 A. L. R. 1; Clallam County v. United States, 263 U. S. 341, 68 L. ed. 328, 44 S. Ct. 121; New York, ex rel. Rogers, v. Graves, 299 U. S. 401, 81 L. ed. 306, 57 S. Ct. 269. Respondent is an independent contractor. The tax is non-discriminatory."

Buckstaff Bath House Co. v. McKinley, 308 U. S. 358, 84 ed. 322, cited by petitioner, is not contrary to our contentions, but rather reinforces them. That is another case which holds that the state may impose a tax upon an independent contractor with the Government. The taxpayer there operated a bath house, which it erected and equipped, under lease from the Secretary of the Interior. The bath house was run as a private business venture for profit by the taxpayer, but by the terms of the lease the bath house on Government property was subject to certain control by the Department of the Interiors. Because of this the contention was made by the taxpayer that it was an instrumentality of the United States, and not subject to payment of

state social security taxes as to its employees. In denying this claim the court, speaking through Mr. Justice Douglas, said:

But it seems clear that petitioner is not, within the meaning of the Social Security Act, such an instrumentality. The mere fact that a private corporation conducts its business under a contract with the United States does not make it an instrumentality of the latter. Fidelity & D. Co. v. Pennsylvania, 240 U. S. 319, 60 L. ed. 664, 36 S. Ct. 298. Petitioner's lease from the Secretary of the Interior did not convert it into such an instrumentality. Petitioner 'is engaged in its own behalf, not the government's, in the conduct of a private business for profit? See Federal Compress & Warehouse Co. v. McIrean, 291 U. S. 17, 23, 78 L. ed. 622, 627, 54 S. Ct. 267. Though it acts with the Government's permission and has received a privilege from the Government, it does not exercise that privilege on behalf of the latter."

We have no quarrel with the above holding. If the taxpayer there had been a real Federal instrumentality the result would have been different. But the Government is not in the bath house business, hence one conducting such a business, even on government-leased property, is not performing a governmental function. The case simply falls under the general classification of independent contractors.

The United States has a constitutional governmental duty to perform in the development and operation for oil and gas purposes of the restricted lands of its Indian wards, hence the decisions consistently hold that the lessee under a departmental lease for that purpose is a government instrumentality.

Alabama v. King & Boozer, 314 U. S. 1, 86 L. ed. 3, is another case dealing with independent contractors. Cer-

tain contractors with the Government for the construction of an army camp on a cost-plus a-fixed-fee basis obtained lumber from King & Boozer, the lumber being sold by King & Boozer to the contractor on the contractor's order. Alabama laid a sales tax on the seller, but made it the duty of seller to add the tax to the sales price and collect it from the purchaser, which in this case was King & Boozer. Applying the state law of Alabama, as announced by the Supreme Court of that state, it seemed to be conceded that under the provisions of the statute "the purchaser of tangible goods who is subjected to the tax measured by the sales price is the person who orders and pays for them """." (p. 10) The Supreme Court of Alabama had held that "the legal effect of the transaction "" was to obligate the contractors to pay for the lumber." (p. 12) This Court said:

ber within the meaning of the taxing statute, and as such were subject to the tax." (p. 12)

There was a complete independent step in the passage of title to this lumber before it became incorporated in the army camp and accepted by the Government. The independent contractors, King & Boozer, were the purchasers of the lumber, and thus the fact that it was intended to be used in building something (under contract) for the Government did not exempt it from the sales tax applicable to the sale to the contractor.

The case simply holds, therefore, that a state sales tax imposed upon a purchaser who in turn was an independent contractor with the Government, is valid.

Smith v. Davis, 323 U. S. 111, 89 L. ed. 107, turns upon the same principle applied in the King & Boleer case, the tax involved being a state tax upon an open account. The Court held that the fact that the asset taxed accrued as a result of work done by an independent contractor with the Government carried no immunity. We quote from the opinion by Mr. Justice Murphy as follows:

The assets of an independent contractor that are derived from the profits of a government contract stand in no preferred constitutional position so far as taxation is concerned."

Penn Dairies, Inc., v. Milk Control Commission, 318 U. S. 261, 87 L. ed. 748, holds that independent contractors selling goods to the Government are not agencies or instrumentalities of Government, and hence are subject to state taxes and regulations. We quote from the opinion on page 269 as follows:

"We may assume also that, in the absence of congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions: Ohio v. Thomas, 173 U. S. 276, 43 L. ed. 699, 19 S. Ct. 453; Johnson v. Maryland, 254 U. S. 51, 65 L. ed. 126, 41 S. Ct. 16; Hunt v. United States, 278 U. S. 96, 73 L. ed. 200, 49 S. Ct. 38; Arizona v. California, 283 U. S. 423, 75 L. ed. 1154, 51 S. Ct. 522. But those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions."

Wilson v. Cook, 327 U. S. 474, 90 L. ed. 793, presents another case where taxpayer's relationship to the United States was that of an independent contractor. It appears that a certain co-partnership "entered into contracts with the United States for the purchase and severance of timber on national forest reserves" (p. 478). The Arkansas Supreme Court upheld the state tax, as against these con-

tractors; of 7c per 1,000 feet of timber severed, and this Court affirmed. The decision apparently turned upon the question of whether these forest reserve lands were an areaover which the United States and exclusive jurisdiction, or whether the State also had legislative jurisdiction therein. Under the Federal statute authorizing the purchase from the state of part of the lands (providing that the state should not lose jurisdiction, etc.), and under the Act of Admission as to the remainder of the lands (providing that the legislative authority of the state was extended over such lands), this Court held that the state had legislative jurisdiction over these lands. Citing then cases dealing with independent contractors the Court expressed the opinion that . the Supreme Court of Arkansas was correct in holding that these contractors to sever timber were subject to the tax. We quote from the opinion on pages 482-483 as follows:

"Our decision in James v. Dravo Contracting Co., 302 U. S. 134, 82 L. ed. 155, 58 S. Ct. 208, 114 A. L. R. 318, supra, and in Javama v. King & Boozer, 314 U. S. 1, 86 L. ed. 3, 62 S. Ct. 43, 140 A. L. R. 615, supra, and the cases cited in those opinions, can leave no doubt that the Supreme Court of Arkansas correctly held that plaintiffs, who are taxed by the state on their activities in severing lumber from Government lands under contract with the Government, cannot claim the benefit of the implied constitutional immunity of the Federal Government from taxation by the state."

Apparently as an after-thought—but too late—the copartnership asserted in this Court that the Government would be adversely affected by an enforcement of the Arkansas taxes in question, in that the statute provided, that the party severing the timber and paying the tax might thereafter collect same from the owner. The Court said that it was not free to consider this claim, for the reason that it was <u>not</u> presented to the Supreme Court of Arkansas or decided by it (p. 483). Thus we have nowhere in Wilson v. Cook any determination of the vital questions presented in the instant case. In fact the Court on page 480 says:

"The record in this case does not disclose that at any time in the course of the proceedings in the state courts plaintiffs asserted the invalidity of a state statute on any federal ground."

There is nothing in Wilson v. Cook to show that the Court regarded these copartners as Federal instrumentalities. On the other hand the language of the Court quoted from pages 482-483 strongly indicates that they were regarded as independent contractors. And under the factual situation there this is evidently what they were. The United States was not performing any governmental functions through these men simply because it had sold to them certain government property. One does not become a Federal instrumentality merely by making a contract to purchase and carry away. There is no analogy between this situation and that of the case at bar, where the United States in response to its duty to its Indian wards is performing the Constitutional, governmental functions of developing and operating restricted Indian lands for oil and gas purposes.

States, under contract, is not a Federal instrumentality, so the owner of a copyright does not become such an instrumentality. In line with this reasoning it was held in Fox Film Corp. v. Doyal, 286 U. S. 123, 76 L. ed. 1010, cited on page 39 of petitioner's brief, that the state could impose a tax upon gross receipts arising from the licensing of copyrighted moving pictures. The rationale of the decision was that a copyright becomes property of its owner, and the fact that it was derived from the United States does not con-

stitute its owner an instrumentality of the Government. The situation is likened rather to that of the purchaser of public lands from the Government. The fact that title was derived from the United States does not make the new owner a government instrumentality.

New York v. United States, 326 U. S. 572, 90 L. ed. 326, cited by petitioner, certainly is not contrary to the views here expressed. That is not really an independent contractor case, but we may consider it here. The case in substance holds that the State of New York in selling mineral waters was not engaged in a governmental function, and therefore could not claim immunity from Federal taxes normally applicable to such sales. It was not part of the conduct of its government for the State of New York to sell mineral water, so it could not claim constitutional governmental immunity upon that ground. As this Court said in Ohio v. Helvering, 292 U. S. 360, 78 L. ed. 1307:

"If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function and must find its support in some authority apart from the police power."

IV.

Income resulting from the functioning of a Federal instrumentality is subject to State taxation, although such taxes cannot be imposed upon the operations of the instrumentality.

The decisions of this Court in which it was held that a state has no power to tax the operations of one acting under an oil and gas or other mineral lease covering lands of restricted Indians have already been noted. These cases originally dealt only with the immunity from state taxation

lease, and in upholding the immunity the Court consistently applied the recognized principles applicable to the functioning of Federal instrumentalities. But the cases did not stop there, for later decisions extended the immunity to include not only the source of income (the operations), but also income itself.

The extension of the immunity to include income is contained in such decisions as Gillespie v. Oklahoma, 257 U. S. 501, 66 L ed. 338, holding that a state cannot tax income derived from a Federal agency (the income referred to being derived from oil produced under restricted Indian leases), and Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 76 L. ed. 815, holding that the United States cannot tax income derived from an instrumentality of the state. Under these decisions it was for a time regarded as established that both source of income and income itself were entitled to the iminunity. This seems to have been true until the decisions in the cases of Helvering v. Therrell, 303 U.S. 218, 82 L. ed. 758, 58 S. Ct. 539; Helvering v. Mountain Producers Corp., 303 U. S. 376, 82 L. ed. 907, and Helbering v. Gerhardt, 304 U. S. 405, 82 L. ed. 1427, were handed down. In the Therrell case it was held that the United States could tax income received in the way of compensation paid out of private corporation assets to persons (not state officers) for services rendered in the liquidation of insolvent corporations. In Helvering v. Moutain Producers Corporation the Court held that income derived from operations under an oil and gas lease covering state school lands was not immune from United States income tax. And in the Gerhardt case it was held that the United States could tax income received as compensation by employees of the Port of New York Authority, a state instrumentality.

It is a noteworthy fact, which we are sure will not escape the Court's attention, that each of these cases involved a question of the taxability of income, and not of the taxability of the source of income where that source was a governmental or a state instrumentality.

The Court in the Mountain Producer's Corporation case, in holding that income derived from a state oil and gas mining lease was taxable, expressly overruled the cases of Gillespie v. Oklahoma and Burnet v. Coronado Oil & Gas Co., both supra. What the Court did was significant, but what the Court did not do was equally significant. For it will be remembered that the Court had for its guidance, and to be considered by it, controlling decisions holding that not only was the source of income immune from taxation, but also that income produced from such source was likewise immune from taxation by the opposite government, when related to instrumentalities of the United States or. of the several states.

This Court, of course, bore these decisions in mind. If, then, it had intended to wipe out entirely the doctrine of the immunity of a governmental agency from state faxation which interfered with or burdened such agency in the performance of its functions, such a broad and sweeping principle would have been announced. What the Court did in each of the three recent cases referred to above was to hold that the income was subject to the tax. And it was clearly not by mere chance that in reaching this result this Court overruled the cases of Gillespie v. Oklahoma and Burnet v. Coronado Oil & Gas Co., both supra, but did not overrule Choctaw O. & G. R. Co. v. Harrison, I. T. I. O. v. Oklahoma, Oklahoma Tax Commission v. Barnsdall Refineries, Inc., Jaybird Mining Co. v. Weir, Howard v. Gypsy Cil Co., and Large Oil Co. v. Howard, all supra, all of which

cases had been decided by this Court, and in each of which the Court had held that an instrumentality such as the one involved in the present case could not be taxed by the opposite government in the discharge of its duties. There is a vast difference between taxing a Federal instrumentality in the performance of its functions; and taxing income which the agency or instrumentality produces or derives as a result of the performance of such functions. The first is a direct tax or burden upon the instrumentality itself, and is violative of the right to immunity therefrom, and therefore unconstitutional. It is a tax, not upon the income, but upon the source from which the income is derived-upon the operations themselves. The second, being at least one step, or possibly further steps removed, does not directly interfere with or impose any tax or burden upon the performance or the functions of the Federal instrumentality, but leaves those functions untouched, and only taxes the income after it has been incorporated into the general corporate structure.

The difference in the two situations is apparent. To take a concrete case: Where a departmental lessee is engaged in the performance of its duties and obligations by producing pil, and is therefore functioning as a Federal instrumentality (as, under the decisions is unquestionably the case) and where a tax is directly imposed upon the production of oil, and that tax is measured by the amount or value of oil produced, this constitutes a direct burden upon the Federal instrumentality and is therefore void. But, where no interference or burden is placed upon the Federal instrumentality in the performance of its functions as such, and it is only after the result of such functioning has been to incorporate into the corporate structure some net income which becomes commingled with the corporate funds

that an income tax is imposed, this is so far removed from the functioning of the Federal instrumentality that it cannot reasonably be held to interfere therewith. This, in substance, is the holding of the Court.

To illustrate again, let us assume that a departmental lessee produces oil from the restricted lease and sells the oil. It costs a certain amount to drill and equip wells, to operate the lease and to market the oil. The excess over and above these costs represents net profit which goes into the general fund of the lessee. The same corporation may realize profits from other activities, as to many or most of which it is not functioning as Federal agency. The tax is imposed upon its general net income, including, of course, that derived from its activities as a Federal instrumentality. This is entirely too far removed from the functioning of the Federal instrumentality itself, and is therefore not violative of the constitutional immunity; but is valid. This too is the holding of the Court, and, we submit, with good reason.

As was said above, the claim of immunity from taxation upon the general income of a corporation cannot be upheld, because it is too remote—at least a further step removed—even though part of that income was produced as a result of the performance of the duties of one acting as a Federal agency. It is really several steps removed from the performance of such duties. After the oil is produced it has to be sold. The proceeds of the sale go into the corporation's funds, and result in either a profit or a loss. It is entirely too remote to say that any taxes thereafter levied upon the net income of the corporation is a direct tax or burden upon the functioning of the Federal instrumentality itself.

If it had never been held that income derived from

the operations of a Federal instrumentality was exempt from state taxation, respondent's immunity with regards to its functioning as such agency would probably never have been questioned. But after this Court corrected what it deemed to be an unwarranted extension of the immunity, the Oklahoma Tax Commission jumped to the unwarranted conclusion that the fundamental principles governing the operations of such instrumentalities had been swept aside. In other words, petitioner in effect says that because this Court has overruled certain specific cases reflecting such extension; and thus has limited the doctrine by cutting it back to its formerly recognized scope, it has completely abrogated the principle of the immunity from state taxation of a Federal instrumentality. It is a clear case of non sequitur!

Suppose that a state legislature, in order to induce new industries to come into a state, should provide that the production from new factories should be exempt from taxation for a period of five years. Suppose then that the state Supreme Court first held that this exempted not only the production from the factory but also the net income derived therefrom. If the state court should thereafter hold that the income was not exempted, and point out the distinction between income and source of income, would that constitute a basis for claiming that the entire statute had been nullified? Yet that is, in effect, the argument of petitioner here!

In Graves v. New York, 306 U. S. 486, 83 L. ed. 927, this sharp differentiation between the source of income and income was clearly recognized. In that case it was held that an employee of Home Owners Loan Corporation (an instrumentality of the United States Government) was subject to the New York income tax. This distinction was clearly expressed by Mr. Justice Stone when on page 480 he said:

"The theory, which once won a qualified approval, that a tax on *income* is legally or economically a tax on its source, is no longer tenable." (Citing authorities.)

The only case that we know of, from either a state or a Federal appellate court, which tends in any degree to . support the contentions of the petitioner under any applicable facts, is that of Santa Rita Oil Co. v. State Board of Equalization, 116 P. (2d) 1012, decided by the Supreme Court of Montana in 1941. (Petitioner's brief, p. 30.) That 3 case simply misconstrued the effect of Helvering v. Mountain Producers Corp., supra, and interpreted the decision as not only overruling the cases of Gillespie v. Oklahoma and Burnet v. Coronado Oil & Gas Co., both supra (the two cases relating to tax on incomes, and which were the only cases overruled by the Court in the Mountain Producers Corp. case), but also as overthrowing the many other decisions of this Court which hold that a state cannot, in the absence of congressional permission, impose a tax directly upon the functioning of a Federal instrumentality.

It is therefore clear that the Montana court by adopting the theory for which petitioner is here contending went off at a tangent in assuming that the doctrine of the immunity of a Federal instrumentality from state taxation had been completely abrogated. In so doing the Montana court failed entirely to make that vital distinction between "income" and "source of income" pointed out by this Court in Graves v. New York, sapra.

The decision in the Montana case was not an authority binding upon the Supreme Court of Oklahoma, and that court refused to follow same, although it was urged in support of petitioner's claims in the instant case. Rather, the Oklahoma Supreme Court adhered to the established principles relating to state taxation imposed upon the operations

of a Federal instrumentality as laid down by the many decisions of this Court. We are therefore constrained to say that we do not believe that the misinterpretation of the Montana Supreme Court will have any effect upon the fundamental questions of Federal constitutional law presented in the instant case.

Petitioner cannot draw us into a quarrel about such cases as Helvering v. Gerhardt, supra, (holding that the United States can tax income received as compensation by employees of a state instrumentality) and Helvering v. Mountain Producers Corp., supra (holding that income derived from operations under an oil and gas lease covering state school lands is not immune from United States income taxes). We think that we have made our position clear that under the present holdings of this Court the immunity from state taxation of an instrumentality of the United States Government does not extend to income derived from the operations of such agency. But we as earnestly assert that under the decisions as they now stand, a Federal instrumentality cunnot, in the absence of congressional consent, legally be taxed by a state upon its operations while engaged in the performance of its essential functions as such, and when the attempted taxes are measured by the products resulting from the agency's operations.

V

The passage of title, by inheritance, to restricted Indian property, is not the same as the functioning of a Federal instrumentality, and so is subject to an estate tax levied by the State.

Although for a time it was held that Indian estates were not subject to the inheritance taxes of a state (Childers v. Beaver, 270 U.S. 555, 70 L. ed. 730), it now appears to be settled that the state may impose such a tax.

—Oklahoma Tax Commission v. United States, 319 U. S. 598, 87 L. ed. 1612;

West v. Oklahoma Tax Commission, 92 L. ed., Adv. Opinions, p. 1220.

These cases are by no means opposed to the principle for which we contend, since they do not sanction the laying of a state tax upon the operations of a Federal instrumentality. The passage by inheritance of an estate is by no means the functioning of an instrumentality of the United States in carrying out constitutional duties and obligations of the Government: The inheritance tax is purely ancillary, and can in no sense be regarded as a direct tax imposed upon the functioning of a government instrumentality. Thus the very reason for the application of the principle of tax immunity disappears in the estate tax case. Not so as to taxes upon the operations of a Federal instrumentality, for thereby the Government might be seriously hampered in the performance of its constitutional duties. The distinction is clear, and we see no reason for confusing the two situations.

In the very recent case of West v. Oklahoma Tax Commission, supra, attention is called to the fact that the tax is imposed upon the transmitting and receiving of economic benefits. That is a far cry from a state tax laid directly upon the operations of a Federal instrumentality, and requires no further comments on our part. In fact the Court has so clearly stated the real basis of the decision that we would be presumptious in elaborating. We quote from the opinion by Mr. Justice Murphy as follows:

"An inheritance or estate tax is not levied on the property of which an estate is composed. Rather it is imposed upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits. United States Trust Co. v. Helvering, 307 U. S. 57, 60, 83 L. ed. 1104, 1107, 59 S. Ct. 692; Whitney v. State Tax Commission, 309 U. S. 530, 538, 84 L. ed. 909, 913, 60 S. Ct. 635. In this case, for example, the decedent had a vested interest in his Osage headright; and he had the right to receive the annual income from the trust properties and to receive all the properties at the end of the trust period. At his death, these interests and rights passed to his heir. It is the transfer of these incidents, rather than the trust properties themselves, that is the subject of the inheritance tax in question."

See also:

Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196; Cornett's Ex'rs. v. Commonwealth, (Va.) 105 S. E. 230.

VI.

When confined within its proper limitations the doctrine of immunity of a Federal instrumentality from State taxation remains a part of the basic law of our land.

We are not asking the Court for any extension of the doctrine of the immunity of a Federal instrumentality beyond the limits of its recognized application. We do not here seek the employment of any novel or untried principles, but of a wise and salutary rule which has been fol-

lowed since the early days of the Republic. It is not we, but our opponents who are asking this Court to reverse its long line of decisions relating to the functioning of a Federal instrumentality.

There is no occasion now for abrogating one of the established constitutional principles of our country. If it is deemed wise to waive the immunity and to consent to the imposition of the taxes, Congress is the one to speak, as this Court has so often held. The responsibility for such action rests with Congress, which has acted where it felt there was necessity. Until such time, the immunity continues in effect.

If unwarranted extensions of the doctrine of immunity (as, e. g., income) are announced, these can be, and have been corrected. But what petitioner here is asking strikes far deeper than that. For the taxes here sought to be enforced by the state are imposed directly upon the operations of a Federal instrumentality. To permit this would be to nullify completely that principle so necessary to the proper functioning of our dual system of government, and could very conceivably result in unutterable confusion, and in hampering the activities of each government. For this touches, not ancillary matters but the fundamental principles relating to the activities of governmental instrumentalities!

The principle for which we contend was created to prevent any threat or impediment to the functioning both of our national and of our state governments. It is a principle which maintains a healthful balance between them, and enables each properly to perform its governmental functions. It is by no means an obsolete doctrine, but is as virile and necessary new as when first announced. The first

paragraph of the syllabus of United States v. County of Allegheny, 322 U. S. 174, 88 L. d. 1209, read as follows:

"Properties, functions, instrumentalities, institutions and activities of the United States, are not, in the absence of express congressional consent, subject to any form of state taxation."

This case was decided some time after the Mountain Producers Corporation case, supra, and shows that there was no intention by the court (as petitioner seems to think) to sweep away the fundamental principles of immunity from state taxation applicable to the operations of Federal instrumentalities.

We quote from the opinion by Mr. Justice Jackson in the Allegheny case as follows:

"But since 1819, when Chief Justice Marshall in the M'Culloch case expounded the principle that properties, functions, and instrumentalities of the Federal Government are immune from taxation by its constituent parts, this court never has departed from that basic doctrine or waivered in its application."

See also:

Standard Oil Co. of California v. Johnson, 316 U. S. 481, 86 L. ed. 1063.

Conclusion

Under the conceded facts of this case and under the law applicable thereto as shown by the repeated decisions of this Court covering a period of many years, respondent is a true instrumentality of the Federal Government, functioning as such in so far as relates to the production of the oil in question, and is entitled to immunity from state taxa-

tion imposed upon its operations in the production of such oil. The judgment of the Supreme Court of Oklahoma was therefore correct and should be affirmed.

Respectfully submitted,

B. W. GRIFFITH, .

Tulsa, Oklahoma, .

Attorney for The Texas Company, Respondent.

Y. A. LAND,
Tulsa, Oklahoma,

B. A. AMES,

FISHER AMES,

Oklahoma City, Oklahoma,

Of Counsel.

November, 1948.



APPENDIX I.

Opinion filed September 23, 1947, by Supreme Court of Oklahoma:

"Syllabus: 1. A Jessee producing oil from lands of restricted Kiowa and Apache Indians under departmental lease approved by and subject to supervision of the Secretary of the Interior of the United States, is engaged in the operation of a governmental instrumentality or agency and in the absence of permissive legislation by Congress, or appropriate Federal consent or waiver or withdrawal of immunity, the oil production or the oil as produced is not subject to the state excise tax of one-eighth of one cent per barrel, nor the state gross production tax of five per cent of the value of the oil produced.".

"'Appeal from the District Court of Oklahoma County, Lucius Babcock, Judge. (fol. 72.) Action by The Texas Company, a corporation, against the Oklahoma Tax Commission to recover certain oil excise taxes and gross production taxes paid under protest of illegality. From an order sustaining demurrer to plaintiff's petition and rendering judgment for defendant, the plaintiff appeals.

"Reversed.

"Ames, Monnet, Hayes and Brown, of Oklahoma City, Okla., Y. A. Land, John R. Ramsey, B. W. Griffith, all of Tulsa, Okla., for plaintiff in error.

"E. L. Mitchell and C. W. King, of Oklahoma City, Okla., for defendant in error.

"Opinion-Filed September 23, 1947."

WELCH, J.:

sessments, gross production and oil excise fax made against. The Texas Company for oil production, under departmental leases on restricted lands of Kiowa and Apache Indians. (fol. 73.) The plaintiff, hereinafter referred to as Company, paid the taxes under protest to the Oklahoma Tax

[APPENDIX]

Commission, (hereinafter referred to as 'Commission,') and sued for recovery back. Plaintiff claimed there was legal immunity from such taxes because in the operation of such leases and in the production of such oil, 'Company' was an instrumentality of the Federal Government.

"That such a lease is an instrumentality of the Federal Government has been held in many cases hereinafter cod. Among the first such cases, if not the first, was Indian Territory Illuminating Oil Company v. Oklahoma, 240 U. S. 522, 60 L. ed. 779.

"As applied to a gross production tax on oil, the exact contention of 'Company' of immunity from such tax was sustained in *Large Oil Co.* v. *Howard*, 248 U. S. 549, 63 L. ed. 416, and in *Howard* v. *Gypsy Oil Co.*, 247 U. S. 504, 62 L. ed. 1239.

"And the United States Congress has acted on the theory that such immunity exists in the case of leases of this character unless waived. The Congress has adopted acts expressly waiving such immunity and granting to this state the authority to apply the gross production tax as to certain designated Indian lands, the Osage Indian Lands by act in 1921 (41 Stats. at L. 1250), the Kaw Indian Lands (fol. 74), by act in 1924 (43 Stats. at L. 176-177), and as to lands of the Five Civilized Tribes by act in 1928 (43 Stats. at L. 496).

"As applied to the oil excise tax the exact contention of immunity from such tax here made by 'Company' has been sustained by this court in Barnsdall Refineries, Inc., v. Oklahoma Tax Commission, 171 Okl. 145, 145 P. (2d) 918, affirmed in Oklahoma v. Barnsdall, 296 U. S. 521, 80 L, ed. 366.

"Thus it has been established and for many years recognized in this court, in the Congress and in the Supreme Court of the United States, that in the case of such leases neither of the taxes here involved may be imposed without waiver of immunity or permissive legislation by the Congress.

"But the 'Commission' contends that, in foundation, the above rule rests upon other and former decisions of the Supreme Court of the United States dealing generally with the 'governmental instrumentality' rule, and that all such former decisions as well as those heretofore cited, were in effect overruled in Helvering v. Mountain Producers. Corp., 303 U. S. 376, 82 L. ed. 907.

"Upon consideration of that point we observe the Mountain Producers case relates to income tax assessed against the net income or personal profit earned by a lessee in a position (fol. 75) similar to that of 'Company.'

"Long prior to the Mountain Producers case that court had extended the governmental instrumentality rule to include such personal income or profit within the tax immunity, and had held that income tax could not be assessed against such an oil and gas lessee. See Gillespie v. Oklahoma, 257 U. S. 501, 66 L. ed. 338, and Burnett v. Coronado Oil and Gas Co., 285 U. S. 393, 76 L. ed. 815.

"The decision in the Mountain Producers case was a reconsideration of that exact income tax question, and in the latter case that court held that such extension of the governmental instrumentality rule was without adequate foundation or support, and that court expressly overruled the two former decisions, the Gillespie case and the Burnett case, and expressly held in the Mountain Producers case that the income tax might properly be assessed.

"While that court thus specifically restricted the limits of the governmental instrumentality rule to that extent, we do not find in that decision any abolition of the rule, or any further departure from former application of the rule than is specifically made in and by that decision.

(fol. 76) "The Mountain Producers case specifically overruled the two former income tax cases mentioned, but Adid not expressly overrule either of the gross production tax cases above cited nor the Barnsdall case, supra, nor indicate any specific intention of so doing.

"It is the view of the writer of this opinion, speaking for himself alone, that for the reasons pointed out in the briefs one might well join in the request that the Supreme Court of the United States reconsider this question as applied to a tax on the oil as it did reconsider the question as applied to the tax on the personal income or net profit of the oil producer, which consideration resulted in a reversal of the rufe as to such income tax as we have noted. But it is thought beyond the power of this court to now engage in such reconsideration, in view of the cited decisions of the higher authority which thus far wholly sustain the claim of 'Company' to immunity from the tax here involved.

"Upon questions of federal law, citizens and their attorneys have the right to rely upon decisions of the Supreme Court of the United States, and upon such questions it is our fixed duty to follow such decisions, leaving to the United States Congress or Supreme Court the making of the necessary changes in such legal rules.

(fol. 77) "In a later case, United States v. County of Allegheny, 322 U. S. 174, 88 L. ed. 1209, the Supreme Court of the United States recognized that in the Mountain Producers case the rule of implied immunity had been 'sharply curtailed,' but that is not to say an abolition of the rule, but a limitation or curtailment thereof, definitely leaving the balance thereof in full force.

"Other authorities are cited to support the view of 'Commission' as to the implied or extended effect to be given the Mountain Producers decision. We have considered them but find further discussion of them not necessary, other than to say that we cannot construe the decision in the Mountain Producers case to go to the extent contended for.

"We regard the decisions of the Supreme Court of the United States, supra, as binding upon us, and in view thereof the plaintiff's petition stated a cause of action. It was error to sustain a demurrer thereto.

"The judgment for defendant is reversed, with directions to overrule the demurrer to plaintiff's petition and proceed consistent with the views here expressed.

"Hurst, C. J.; Davison, V. C. J.; Riley, Gibson and Luttrell, JJ., concur.

"Corn, J., dissents."

APPENDIX II.

Title 68, Oklahoma Statutes Annotated:

Sec. 1475., Action to Recover Taxes as Additional Remedy to Aggrieved Taxpayer—Payment of Taxes—Notice of Intention—Refund if Taxpayer Prevails—Scope of Remedy—Process—Parties—Payment Under Protest Pending Judicial Determination of Questions in Another Action.

In addition to the right of appeal to the Supreme Court provided for in Section 26 of this act, a right of action is hereby created to afford a remedy to any taxpayer aggrieved by the provisions of this act or of any other state tax law, or who resists the collection of or the enforcement of the rules or regulations of the Tax Commission relating to the collection of any state tax.

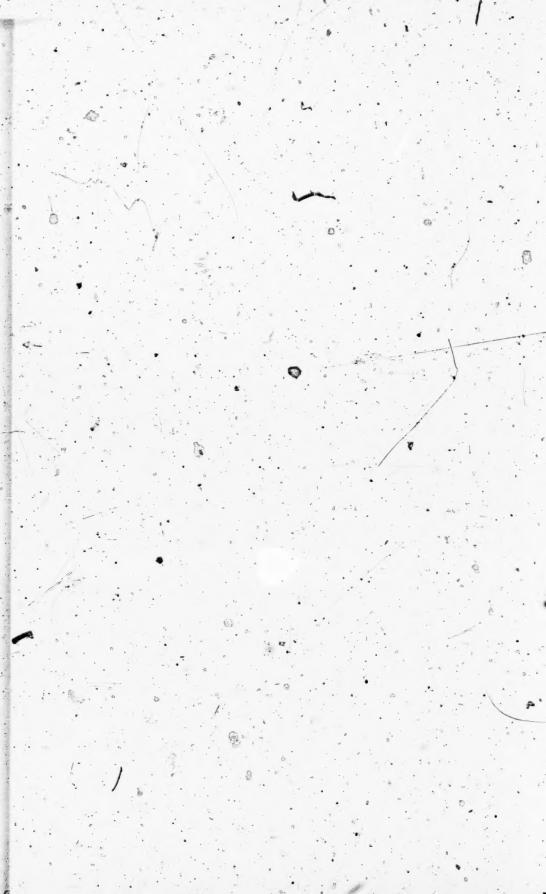
Any such taxpayer shall pay the tax to the Tax Commission and at the time of making such payment shall give notice to the Tax Commission of his intention to file suit for recovery of such tax. Upon receipt of such notice the tax so paid shall be segregated and for a period of thirty (30) days shall be held by the Tax Commission in its depository account with the State Treasurer. If suit be filed within such thirty (30) days period, the fund so segregated shall be further held until the final determination of the suit. If the taxpayer prevails the Tax Commission shall, by cash voucher drawn by the Tax Commission upon its depository account with the State Treasurer, refund to the taxpayer the amount of tax determined not to be due pursuant to the final judgment of the court having jurisdiction, together

6 [APPENDIX]

with interest on such amount at the rate of three per gent (3%) per annum from the date of payment by the taxpayer to the date of the court's final order.

This section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and the subject-matter. It shall be construed to provide a legal remedy in the state or federal courts by action at law in cases where the taxes complained of are claimed to be an unlawful burden on interstate commerce, or the collection thereof violative of any congressional act or provision of the Federal Constitution, or in cases where jurisdiction is vested in any of the courts of the United States: In all actions brought here under service of process upon the Chairman of the Oklahoma Tax Commission shall be sufficient service, and the Tax Commission shall be the sole, necessary and proper party defendant in any such suit, and the State Treasurer shall not be a necessary or proper party thereto.

Upon request of any tax payer and upon proper showing that the principle of law involved in the assessment of any tax is already pending before the courts for judicial determination, the taxpayer, upon agreement to abide by the decision of the court, may pay the tax so assessed under protest, but need not file a suit. In such case the tax so paid under protest shall be segregated and held by the Tax Commission in its depository account until the question of law involved shall have been determined by the courts, and shall then be disposed of as herein provided.



LIBRARY UPREME COURT, U.A.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

THE TEXAS COMPANY, a Corporation,

Appellee,

VERSUS

OKLAHOMA TAX COMMISSION, Appellant.

No. 14 4 1

MAGNOLIA PETROLEUM COMPANY, a Corporation, Appellee,

VERSUS

OKLAHOMA TAX COMMISSION,

Appellant.

BRIEF OF APPELLANT

R. F. BARRY, . Oklahoma City, Oklahoma, Attorney for Oklahoma Tax Commission, Appellant.

JOE M. WHITAKER, of Counsel. JULY, 1948.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 703

THE TEXAS COMPANY, a Corporation,
Appellee,

VERSUS

OKLAHOMA TAX COMMISSION,

Appellant.

No. 704

MAGNOLIA PETROLEUM COMPANY, a Corporation, Appellee,

VERSUS

OKLAHOMA TAX COMMISSION,
Appellant.

BRIEF OF APPELLANT

STATEMENT OF THE CASE

The above styled and numbered appeals have been consolidated for both oral argument and briefing.

These cases arose through the Oklahoma Tax Commission making an assessment of the following enumerated axes against the appellees:

- 1. A nondiscriminatory gross production tax in an amount equal to five per centum of the gross value of the oil, gas, and casinghead gas produced, but not to exceed what otherwise would be the rate for ad valorem purposes if subjected to that tax, the tax being levied in lieu of all other tax on the oil, gas, casinghead gas, and all appliances, tools and machinery directly used and employed in the production of oil and gas.
 - 2. A non discriminatory tax of 1/8 of 1¢ per barrel on all oil produced prior to July 1, 1943, and the same character of tax in the amount of one mill per barrel on all oil produced after that date.

The properties from which the oil and gas were produced lie wholly within the territorial boundaries of the State of Oklahoma. The properties of the appellees used in producing the oil and gas admittedly had a taxable situs in Oklahoma and were subject to the taxes assessed if not impliedly exempt therefrom as federal instrumentalities. The appellees here assert that they were federal instrumentalities and the issue presented is probably limited to whether or not the appellees as federal instrumentalities are exempt from the taxes assessed.

The Texas Company paid taxes assessed under protest and filed suit in the District Court of Oklahoma County. Oklahoma, to recover the taxes so paid. The Tax Com-

murrer was by the trial court sustained. The Texas Company elected not to plead further and the case was thereupon dismissed. From the judgment of dismissal, the Texas Company appealed to the Supreme Court of Oklahoma.

The Magnolia Petroleum Company paid the taxes assessed under protest and filed formal written protests. The protests were consolidated for hearing before the Tax Commission. After, the hearing was had on the consolidated protests, the Tax Commission sustained the tax assessment in its entirety and the Magnolia Petroleum Company perfected an appeal direct to the Supreme Court of Oklahoma.

On September 23, 1947, the Supreme Court of Oklahoma handed down separate opinions in the cases. The judgment of the lower tribunal in each case was reversed. Thereafter the appellant filed a petition for rehearing. The petition for rehearing was denied January 27, 1948, and appellant then perfected separate appeals to this Court.

After the opinion was handed down by the Supreme Court in the Texas Company case but prior to the denial of the petition for rehearing in that case, the appellant filed in the case a motion wherein it admitted the correctness of all facts well pleaded by the Texas Company in its petition and requested the Supreme Court to render final judgment therein so as to avoid the necessity of the case going back to the District Court for judgment and then coming back up on appeal. The motion was by the Supreme Court

rendered in favor of the Texas Company. See Texas record, page 44. It follows that the decisions of the Supreme Court of Oklahoma in both the Texas Company case and the Magnolia Petroleum Company case are now final judgments.

No question is here raised in connection with the jurisdiction of the lower tribunals, nor is there any question of sufficiency of the pleadings involved. The cases are here on their merits.

THE OPINION

The principal opinion was handed down in the Texas Company case (Tex. R. 36-39). The rule of law laid down in the case is stated in the syllabus as follows:

- I. A lessee producing oil from lands of restricted Kiowa and Apache Indians under departmental lease approved by and subject to supervision of the Secretary of the Interior of the United States, is engaged in the operation of a governmental instrumentality or agency and in the absence of permissive legislation by Congress, or appropriate Federal consent or waiver or withdrawal of immunity, the oil production or the oil as produced is not subject to the state excise tax of one-eighth of one cent per parrel, nor the state gross production tax of five per cent of the value of the oil produced."
- The substance of the opinion is this:
- (1) That this Court had held that a lessee under a departmental lease covering the lands of restricted Indians is a federal instrumentality:

- (2) That this Court had denied unto Okeahoma the right to impose a gross production tax in the case of Large Oil Company v. Howard, 248 U.S. 549, and the right to impose the proration tax was denied in Barnsdall Refining Company v. Oklahoma Tax Commission, 296 U.S. 51, and that it had thus been established by this Court that such taxes could not be imposed on the appellees in the absence of consent of Congress;
- (3) That the eases above referred to were not expressly overruled by the Helvering V. Mountain Producers' case, 303 U.S. 376; that income taxes were involved in that case and not gross production and proration taxes. The Court then stated that:

"It is the view of the writer of this opinion, speaking for himself alone, that for the reasons pointed out in the briefs one might well join in the request that the Supreme Court of the United States reconsider this question as applied to a tax on the oil as it did reconsider the question as applied to the tax on the personal income or net profit of the oil producer, which consideration resulted in a reversal of the rule as to such income tax as we have noted. But it is thought beyond the power of this court to now engage in such reconsideration, in view of the cited decisions of the higher authority which thus far wholly sustain the claim of 'Company' to immunity from the tax here involved.

"Upon questions of federal law, citizens and their attorneys have the right to rely upon decisions of the Supreme Court of the United States, and upon such questions it is our fixed duty to follow such decisions, leaving to the United States Congress or Supreme Court the making of the necessary changes in such legal rules."

In the Magnolia Petroleum Company case, the Supreme Court of Oklahoma in effect adopted the syllabus in the Texas case as the law of that case. In the body of the opinion the decision in the Texas Company case was, in effect, adopted (Mag. R. 30-31).

STATEMENT OF FACTS IN THE TEXAS CASE

The restricted Indians involved in the Texas case are all members of the Apache Tribe. All of the properties involved are located in Caddo County, Oklahoma. Three oil and gas leases are involved in this case. One of the leases is under date of January 12, 1938, and covers 40 acres of minerals. Tsa-ah-se-zah (Blanche Achilta) is the lessor and Quintin Little was the Jessee (R. 11-14). Another lease involved is under date of January 23, 1937; it covers 159 acres of land. Oliver Maynahonah and W. B. Mc-Cown, Superintendent for the Kiowa Indian Agency, for and on behalf of Kosope Maynahonah, a minor, are the lessors and Clyde M. Becker was the lessee (R. 15-18). The other lease involved is under date of January 23, 1937; it covers 160 acres of land. Julia Mulkehay. Chale-Tsin, and Ellen Mulkehay, adults, and also W. B. McCown, Superintendent for the Kiowa Indian Agency for and on behalf of Philip Tooisgah, then a minor, are the lessors and Clyde M. Becker was the lessee (R. 19-22a).

All of the leases are for the primary term of ten years and so long thereafter as oil or gas is produced in paying quantities. The royalty reserved is one-eighth of the oil,

gas or casinghead gas produced. Each Indian reserved the right to take his one-eighth royalty interest in kind.

At the time the taxes in controversy were assessed, the Texas Company owned by way of assignment all right, title and interest in the leases, subject only to the one-eighth royalty interest reserved by the Indian (Par 3 of petition, R. 4).

At the time the leases were entered into, the lands covered by the leases were owned by restricted Indians. The lands were not subject to alienation without the consent of the Secretary of the Interior. All of the leases were approved by the Secretary of the Interior. At the time the taxes were assessed, none of the lands, except an undivided 7/16 of the minerals in and under the lease last above referred to, were subject to alienation. During the period of time that the taxes accrued, the 7/16 interest above referred to was owned by non-Indians and the Texas Company paid 7/16 of the taxes levied against it in connection with this particular lease. Therefore, only 9/16 of the taxes levied are here protested.

The taxes were assessed on October 30, 1942. The assessment as to tracts was as follows: Tract No. 1; \$492.33 as gross production taxes and \$10.01 as proration taxes: Tract No. 2, \$491.13 as gross production taxes and \$9.92 as proration taxes; and on Tract No. 3, \$914.23 as gross production taxes and \$18.43 as proration taxes (See Par. 13 of the petition, R. 7-8). As aforesaid, these taxes were paid under protest and suit was brought to recover.

STATEMENT OF FACTS IN THE MAGNOLIA CASE

Seven different oil and gas leases are involved in this case. However, there were only four assessments of taxes; these assessments were protested before the Oklahoma Tax Commission. They were there numbered 1748, 1749, 1750 and 1751. The protests and assessments were by agreement of the parties consolidated for hearing before the Oklahoma. Tax Commission and should be considered as consolidated here.

Where restricted Indians are involved they are members of the Apache, Comanche, Citizen Pottawatomie, and Otoe & Missouria Tribes. The properties are located in the Counties of Pottawatomie, Caddo, Stephens and Pawnee, Oklahoma. Four separate stipulations covering the facts were entered into, one in connection with each protest. (See R. 6-18). We are inclined to believe that no detailed factual statement is necessary in connection with the particular tracts owned, the number of acres in each tract, the names of the several Indian lessors, etc., and that a general statement of the facts will suffice.

All leases involved are departmental leases—leases covering lands in which restricted Indians owned an interest. The Secretary of the Interior approved all of the leases. When the taxes in controversy were assessed in connection with the Pau-Kune lease and the Kla-da-ing lease, undivided interests in the minerals were owned by non-Indians. See Paragraph No. 6 of stipulation in No. 1750 (R. 18), and Paragraph No. 2 of stipulation in No. 1750 (R. 14).

All of the leases are for the primary term of ten years and as long thereafter as oil or gas is produced in paying quantities. The royalty reserved is one-eighth of the oil or gas produced. Each Indian reserved the right to take his one-eighth royalty interest in kind.

At the time the taxes were assessed, the Magnolia Petroleum Company owned all right, title and interest in the leases, subject only to 1/8 royalty interest reserved in the Indian. In some instances Magnolia was the original lessee and in others it held by way of assignment.

In Case No. 1748, the taxes assessed covered a period from June 1, 1942, to March 1, 1946. The gross production taxes assessed totaled \$37,053.71 and proration taxes totaled \$679.84 (R. 26).

In Case No. 1749, the taxes assessed covered a period from June 1, 1942, to March 31, 1944. The gross production taxes assessed totaled \$389.53 and the proration taxes totaled \$7.67 (R. 26 27).

In Case No. 1750, the taxes assessed covered a period from June 1, 1942, to March 1, 1946. The gross production taxes assessed totaled \$126.52 and the proration taxes totaled \$2.07 (R. 27).

In Case No. 1751, the taxes assessed covered a period from June 1, 1942, to March 1, 1946. The gross production taxes assessed totaled \$12,773.71 and the proration taxes totaled \$233.89 (R. 27).

At the time the taxes were assessed in Case No. 1751, the Pau-Kune lease, the period being from June 1, 1942,

to March 1, 1946, one-third of the minerals in and under the tract were owned by a non-Indian. The assessment has been denied in its entirety. It follows that Oklahoma has been denied the right to tax even where a non-Indian owned an interest in the minerals:

At the time the taxes were assessed in Case No. 1750, the Kla-da-ing lease the period being from June 1. 1942, to March 1, 1946, one-fourth of the minerals were owned by the heirs of Mary Moleno. A fee simple patent had been issued to these heirs by the Secretary of the Interior and this one-fourth interest accordingly became unrestricted and isnow unrestricted (R. 64-65). The right to assess taxes on this one-fourth interest has also been denied.

STATEMENT AS TO JURISDICTION

The Federal statutory provision believed to sustain the jurisdiction of this Court is Section 237 (a) of the Judicial Code as amended by the Act of February 13, 1925, [28 U.S.C.A., Sec. 344 (a)].

The Supreme Court of Oklahoma erroneously decided that an imposing of the taxes in controversy would violate an implied constitutional right of the appellees as Federal instrumentalities to be free of such taxes. In so holding, the court denied unto Oklahoma its inherent sovereign constitutional right as one of the states of the union to levy and collect taxes on properties lying wholly within her territorial boundaries. Art. X of the United States Constitution.

SPECIFICATION OF ERRORS

The Assignment of Errors in the Texas case are found at Tex. R. 49-53; in the Magnolia Petroleum-case, they will be found at Mag. R. 39-42. The Assignment of Errors are substantially the same It is for this reason that we are inclined to believe that a summary of the Assignment will suffice:

- (1) The Supreme Court of Oklahoma erred in holding that an imposing of the tax in controversy was impliedly denied Oklahoma under the Constitution of the United States.
- of Oklahoma is to deny unto Oklahoma its sovereign right and power as one of the sovereign states of the union to tax properties and subjects lying wholly within her territorial boundaries, which right exists in and is exercised by the other states of the union.
- (3) The Supreme Court of Oklahoma erred in holding that an imposing of the taxes in controversy would burden the appellees as a Federal instrumentality.
- (4), The Supreme Court of Oklahoma erred in construing the decision of this Court in connection with the assues here presented. Under the decision of this Court, the taxes here imposed are not considered to cast such a burden on or to create such an interference with the office and function of a Federal instrumentality as to violate the United States Constitution. Under the decision of this Court, the right to assess the taxes here assessed has been sustained.

ARGUMENT AND AUTHORITIES

Our argument and authorities in support of these assignments of error will be presented under five general propositions:

PROPOSITION No. 1

The gross production tax here assessed is a nondiscriminatory tax levied in lieu of ad valorem taxes. The tax was levied upon the properties of appellees in which no others owned an interest.

The appellees are private corporations that were organized to engage in business for profit. They domesticated in the State of Oklahoma many years ago. At all times here involved, they were authorized under the laws of the State of Oklahoma to engage in the oil and gas business, and did, during said time, engage in such business in Oklahoma for profit. The taxes here assessed were levied on the properties of the appellees. In these properties no one else owned an interest. The Magnolia Petroleum Company so stipulated in paragraph number 4 of the several stipulations of facts. We quote this paragraph:

"That the Gross Production and Proration Taxes which the Oklahoma Tax Commission seeks to collect from Magnolia Petroleum Company in this proceeding are levied upon the interest of the Magnolia Petroleum Company in the said oil and gas lease covering the land first above described."

The taxes, therefore, were not levied on properties owned, either by the United States or a restricted Indian. The sole and only connection that a restricted Indian had with these cases is that his restricted status brought the Federal Gov-

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ernment in and thus a Federal instrumentality was created. He, the restricted Indian, then receded into the background and there remained. During the period of time in controversy, the restricted Indian performed no functions and did a no supervising. He did nothing. It is true that his presence as a restricted Indian was at all times necessary but it was only necessary for the purpose of keeping alive a Federal instrumentality. If his restrictions had been removed, the Federal Government would have withdrawn and no Federal instrumentality would have existed. After production was had, the restricted Indian's relationship with the appellees and the appellee's relationship with the restricted Indian was no different than the relationship that exists between a. lessee and a non-Indian royalty owner. The question here posed is whether or not the tax levied directly burdened the appellees as Federal instrumentalities by depriving them of the power to serve the Federal Government as it was by that Government intended that they should serve it? We confidently assert that under the facts here presented, this Court. has answered the question, thus posed, in the negative.

The gross production taxes here assessed were levied under Section 821, Title 68, O.S. 1941. In so far as is here material, it is therein provided in substance that every person engaged in producing within Oklahoma, crude oil and natural gas, shall pay a tax equal to five per cent of the gross value of the oil and gas produced; that the payment of said tax shall be in full and in lieu of all taxes levied by the State, or any of its political subdivisions, upon any prop-

erty rights attached to or inherent in the right to said minerals, upon the mineral rights belonging to said land, upon the machine, appliances and equipment used in and around any producing well, upon the oil, gas or other minerals during the tax year in which produced, and upon any investment in any leases, rights, minerals or other property above mentioned. The State Board of Equalization was given authority to adjust the rate of levy so as to conform to the average ad valorem rate. This section of the Statute is rather long and for such reason we include it in the appendix of this brief. This tax is a nondiscriminatory tax. levied for revenue purposes. It is apportioned as follows:

Seventy-eight per cent is placed to the credit of the State's General Revenue Fund to be used in defraying the general expenses of state government; 10% is paid to the County Treasury from whence the oil and gas was Produced to be used in the county for highway construction and maintenance purposes. Another 10% is likewise apportioned for the use of the schools in the county. The remaining 2% is placed to the credit of the Tax Commission to be used for administration purposes. See Sec. 827. Title 68, O.S. 1941. As above stated, 20% of the moneys collected as gross production taxes are returned to the county from ' whence the oil and gas was produced and by that county. used for school and highway purposes. A portion of the 78% so going into the General Revenue Fund also finds its way back to the County from whence the oil and gas was produced. In so far as schools are concerned, during the

Legislature appropriated approximately 63% of the General Revenue Funds for school purposes. For the period July 1, 1941, to June 30, 1943, approximately 38% was appropriated for the common schools and 25% for colleges and universities. For the period July 1, 1943, to June 30, 1945, approximately 40% was appropriated for the common schools and 23% for colleges and universities. Thus, restricted Indians who, as citizens of Oklahoma, attend Oklahoma's schools and use Oklahoma's highways, are directly benefited through the lessees payment of the taxes in controversy. If the lessees are not required to pay the taxes, then the moneys go into its private treasury and the restricted Indian receives no benefit of any kind.

Oklahoma enacted a gross revenue tax in 1908. It was, in effect, a levy on the gross receipts of public service companies and on receipts of the producers of ore, oil and gas. In Meyer v. Wells Fargo & Co., 223 U.S. 298, 32 S. Ct. 218, this Court held that the Act was unconstitutional when applied to a foreign public service company engaged in business partially within and partially without the state. The Act was amended in 1909 and 1910, but remained a gross revenue tax. In Comanche Light and Power Co. v. Nix, 53 Okla. 220, 156 Pac. 293, the Supreme Court of Oklahoma held the amended Act unconstitutional when applied to a domestic public service company. This opinion is based on the Meyer case, supra. Thereafter, in 1913, a gross production tax was enacted. This Act was from time

to time amended. See history at close of Sec. 821, supra, and author's statement of history in notes at PP. 539-540 of Title 68, O.S.A. The Gross Production Tax Act as amended in 1916, has not been materially changed. Since 1916, the constitutionality of the Act has been sustained a number of times by the Supreme Court of Oklahoma. In fact, the constitutionality of the Act is not here challenged by the appellees, except as applied to their properties on the lands of restricted Indians.

In Shaffer v. Carter, 252 U.S. 37, 40 S. Ct. 221, Oklahoma sought to impose income taxes on income accruing from oil and gas produced in Oklahoma. The taxpayer there contended that a gross production tax had been paid on the production and this tax was in lieu of all other taxes. This Court held that the gross production tax paid was a tax in lieu of an ad valorem tax and that payment thereof did not prevent Oklahoma from imposing an income tax. The Supreme Court of Oklahoma, in dealing with the Act as it has existed since 1916; has uniformly held that the tax here under discussion is: (1) a property tax: (2) imposed in lieu of an ad valorem tax and is a substitute therefor, and-(3) the payment of a given per cent of the gross value of the oil and gas produced is merely a means of ascertaining the fair cash value of properties used in production and that the production or lack thereof merely goes to make up the value of the properties as a going concern.

We quote the 1st. 2nd, 14th and 15th syllabi of the Official Report in the case of In re: Ske ton Lead & Zinc

Co.'s Gross Production Tax for 1919, 81 Okla. 134, 197 Pac. 495:

- "I. Under Chapter 39, Sess. Laws 1916: The Oklahoma "Gross Production Tax" imposed on oil and gas (lead and zinc) producing companies was intended as a substitute for the advalorem "property tax." Shaffer V. Carter. 252 U.S. 37.
- "2. The 'gross production tax' levied under chapter 39, Sess. Laws 1916, is a 'property tax' purely, and is levied in full and in lieu of all other taxes, state, county, township, district, and municipal.
- 14. The provision in chapter 39, Sess. Laws 1916, for the payment of a sum equal to 1½ per cent. of the gross value of lead and zinc products is merely a means or measure adopted by the Legislature for ascertaining the fair cash value of the mills, plants, machinery, equipments and other property used in the operation thereof, as a going concern.
- and all other property, being exclusively the private property of the lessee, and having a situs within this state, and not being exempt by law, are subject to state taxation, and the gross production tax, being merely a measure for ascertaining the fair cash value of such property, is a valid tax."

We wish to direct the Court's attention to the fact that the Supreme Court of Oklahoma has uniformly held that the law adopted in the syllabus is the law of the case. See Corbin v. Wilkinson, 175 Okla. 247, 52 Pac. (2d) 45.

As late as 1936, the Supreme Court of Oklahoma reaffirmed the law as announced in the Skelton case, supra. This it did in the case of State v. Indian Royalty Co., 177 Okla. 238, 58 Pac. (2d) 601. Our court there again points out that the Legislature had no other object than to levy

a property tax upon mining properties at their fair cash value, using the production therefrom as a yardstick. That the levy is not upon the mining products themselves, but upon all of the property used in producing the oil and gas. The issue there presented was whether or not an account receivable arising from oil sold in December but not paid for until the following January was subject to ad valoren tax. The court there held it was not subject to ad valorem tax for the reason that gross production taxes had been paid.

We wish to point out the properties upon which the taxes were levied in the instant case. When oil is produced, it is either flowed or pumped into flow or settling tanks. In these tanks the water and certain basic sediment that is produced with the oil is permitted to settle to the bottom of the tank. This settling process is often assisted through the use of chemicals. After this settling process has taken place, the crude oil in the tank is measured. This is the last step in the production phase. So considered by the oil fraternity and so considered by the appellant. It is here that the tax is levied. It follows, therefore, that the flow or settling tanks and all machinery, tools and equipment back thereof that are used in producing the oil and gas are subjected to the gross production tax and exempted from the ad valorem tax. Generally speaking, these properties would include the flow lines, derrick, pumping unit, rods, tubing, pipe, etc. In brieft any and all properties used in producing the oil and gas. If this Court sustains the Oklahoma Supreme Court and holds that the properties of the appellees are not

subject to gross production taxes, then all properties of the appellees that are used in producing the oil and gas, go tax free. This for the reason that Oklahoma has exempted these properties from ad valorem taxes believing that a gross production tax would be paid thereon.

The fact that the tax Oklahoma here seeks to impose is a property tax, and in effect an ad valorem tax, becomes material when it is remembered that this Court has always held that a state can impose an ad valorem tax on the properties of a Federal instrumentality. The correctness of our statement is established by the opinion of this Court in Susquehanna Power Co. v. State Tax Commission of Maryland, 283 U.S. 291, 51 S. Ct. 434. In that case, an ad valorem tax was imposed upon property of a contractor who had been licensed by the Federal Power Commission. Under the license he had contracted to build a dam for the purpose of impounding water to be used in conrection with a power plant. The land assessed was inundated by the waters of the lake. The contract among other things provided that "in constructing and operating its power plant under the Federal license, it, and its lands and property used in the power project, are agencies or instrumentalities of the Federal Government, state taxation of which is impliedly prohibited by the Constitution." This Court held that notwithstanding the fact that the contractor was a Federal instrumentality, his properties used in connection therewith were subject to the tax assessed. We quote from the body of the opinion, Page 294, U.S. Report:

"(4). With that end in view, the distinction has long been taken between a privilege or franchise granted by the government to a private corporation in order toeffect some governmental purpose, and the property employed by the grantee in the exercise of the privilege. but for private business advantage. The distinction was pointed out by Chief Justice Marshall in McCulloch V. Maryland, 4 Wheat, 316, 436, 4 L, ed. 579, and in Osbbrn V. Bank. 9 Wheat. 738, 867, 6 L. ed. 204; see Union Pac. Railroad Co. v. Peniston. 18 Wall. 5. 34-37, 21 L. ed. 787. It has been followed without departure, and property so owned and used has uniformly been held to be subject to state taxation. Thomson V. Union Pacific Railroad Co., 9 Wall, 579. 19 L. ed. 792; Central Pacific R. Co. v. California, 162. U.S. 91, 16 S. Ct. 756, 40 L. ed. 903; Union Pac. Railroad Co. v. Peniston, supra; Baltimore Shipbuilding & Dry Dock Co. v. Baltimore, supra; Gromer v. Standard Dredging Co., 224 U.S. 362, 32 S. Ct. 499. 56 L. ed. 801; Ackerlind V. United States, 240 U.S. 531, 36 S. Ct. 438, 60 L. ed. 783; Alward V. Johnson. 282 U.S. 509, 51 S. Ct. 273, 75 L. ed. 496, decided February 24, 1931; see Choctaw, O. & G. R. Co. v. Mackey: 256 U.S. 531, 41 S. Ct. 582, 65 L. ed. 1076; Group No. 1 Oil Corp. v. Bass, 283 U.S. 279, 51 S. Ct. 432, 75 k. ed. 1032, decided this day.

In Union Pac. Railroad Co. V. Peniston, 18 Wall. 5, 21 L. ed. 787, cited in the above quotation, this Court pointed out that the taxing power of a state is one of its attributes of sovereignty that exists independent of the Constitution. That this power may be exercised to an unlimited extent upon all property, trades, business and avocations existing or carried on within its territorial boundaries; that this power is indispensable to a state's continued existence. The court there points out that a tax on a Federal agency is a "direct obstruction to the exercise of Federal powers."

but where the tax is laid upon the property "it is not imposed upon the franchise or the right of the company to exist and perform the functions for which it was brought into being. Nor is it laid upon any act which the company has been authorized to do." At page 3.3 of the Official Report, this Court said: "It may therefore be considered as settled that no constitutional implications prohibit a state tax upon the property of an agent of the government merely because it is the property of such an agent." The tax levied in the above case was an ad valorem tax on several miles of railroad. The railway company had been created by an Act of Congress and performed both military and postal service for the United States. It protested the tax on the theory that it was immune therefrom as a Federal instrumentality.

In Helvering V. Mountain Producers Corp., 303-U.S. 376, 58 S. Ct. 623, this Court points out that it has "always recognized that no constitutional implication prohibits a nondiscriminatory tax upon the property of an agent of the government merely because it is the property of such an agent used in the conduct of the agent's operations and necessary for the agency." (See Page 385 U.S. Report). McCulloch v. Maryland, 4 Wheat. 316; Alward v. Johnson, 282 U.S. 509, and Union Pac. Railroad Co. v. Peniston, supra, are cited. For a statement of the general rule, see Vol. 2, Cooley on Taxation, 4th Edition, P. 1288, Sec. 1607.

The only exception to the above rule seems to be in those cases where there is an attempt to levy an ad valorem tax on property lying within a Federal area. The tax in such instances is denied. It is denied for the sole and only reason that the United States has exclusive jurisdiction within the area. The theory being that the state has no more right to tax properties within a Federal area than it does to tax properties lying in another state.

The rule of law laid down in the above cited case is so well established that we will not burden this brief with further reference to opinions of this Court where the rule is announced.

We do wish to call the Court's attention to the fact that a property tex where levied on property lying within a state has never been considered to violate the commerce clause of the Constitution. If a property tax does not burden and regulate those engaged in interstate commerce, how can it be said such a tax burdens the appellees in the role of Federal instrumentalities? The rule of law contended for in connection with the fact that a property tax may be imposed on the properties of those engaged in interstate commerce is stated in Sec. 107. P. A62 of 15 C.J.S. as follows:

A state may, by any form of property taxation, tax property having a situs therein, notwithstanding it may belong to persons or corporations engaged in interstate commerce and may be used therein, although owned by foreign corporations or persons domiciled elsewhere. The fact that property is subject to regulations of congress as interstate commerce does not prohibit its local taxation * * *

It is for this reason that states have always been per-ormitted to tax railway depots and railway cars under the unit rule etc.

We repeat that Oklahoma here seeks only to tax the properties of the appellees. The tax is imposed in connection with the 38 working interest and does not touch the 18 royalty interest. Oklahoma, in fact, has never sought to impose a gross production tax on the royalty interest of the restricted members of the Indian Tribes here involved. That the royalty interest of the restricted Indian is a separate and distinct property from that of the appellees is not subject to dispute. In the first syllabus of McCullough V. Burks, 185. Okla, 502, 94 Pac. (2d) 541, the Supreme Court of Oklahoma held that:

"The word 'royalty,' as used in connection with oil and gas leases, conveyances, and reservations, has a definite meaning in its popular sense. It means a share of the products or proceeds therefrom, reserved to the owner of land for permitting another to use the property, Carroll V. Bowen, 180 Okla, 215, 68 Pac. (2d), 773."

We remind the Court that the restricted Indian reserved the 1/8 royalty interest and for this reason the appellees could have no property right therein. The gross production tax is in fact levied separately on the working interest and the royalty interest. By the second paragraph of Sec. 821. Title 68. O.S. 1941. supra, the tax is levied on the royalty interest, Sections 824 and 831 of the same title provide for collection of the tax on the royalty interest.

We admit that the Supreme Court of Oklahoma followed the theory advanced under this proposition in the case of Large Oil Company v. Howard, 63 Okla. 143, 163 Pac. 537. We submit that the opinion is sound and in accord with a large number of cases from this Court that are therein cited. In that case Oklahoma's right to impose a gross production tax on the properties used in producing from lands of the Osages was sustained. The Court points out that the tax imposed under the gross production statutes as they existed in 1916, was a property tax and that this Court had consistently permitted the imposing of this class of tax on the properties of a private Federal instrumentality. The case was reversed in this Court in a per curiam opinion. 248 U.S. 549, 39 S. Ct. 183. The authority given was the case of Choctaw. O. & G. R.R. Co. V. Harrison, 235 U.S. 292, 35 S. Ct. 27. and Indian Ter. Illuminating Oil Co. V. Okla., 240 U.S. 522, 36 S. Ct. 453. We wish to examine these cases in order to/show that they did not, in our opinion, justify a reversal of the Supreme Court of Oklahoma in the Large Oil Co. /case.

In the Choquaw, O. & G. R.R. Co. case, supra, this Court had under consideration Section 6 of the Oklahoma Act approved May 26, 1908, under which a gross receipts tax of 2 per cent was levied on the gross receipts of coal produced. The railway company produced coals from mines belonging to the Choctaw and Chickasaw Indian Tribes. It protested payment of the tax on the theory that the tax was an occupation or privilege tax from which it was im-

mune as a Federal instrumentality. This Court agreed with the contention so made and held that the tax levied was an occupation tax. We submit that the following quoted language sustains our contention that the Court would have held otherwise had the tax levied been a property tax:

It is unnecessary to consider the power of the State of Oklahoma to treat coals dug from mines operated by the appellant as other personally, and to subject them to a uniform ad valorem tax, for it seems to us clear that the Act of 1908 provided for no such imposition. Its very language imposes a gross revenue the which shall be in addition to the taxes levied and collected upon an ad valorem basis. We cannot, therefore, conclude that the gross receipts were intended merely to represent the measure of the value of property liable to a general assessment — provision is made for determining that upon a different basis. * * *"

Another distinction between the above referred to case and the instant case is that appellees here acquired a vested interest in the leasehold estate when production was obtained. Brennan V. Hunter, 68 Okla. 112, 172 Pac. 49. The lessee here has the right to produce the oil and gas to point of exhaustion. The properties here taxed are admittedly the properties of the appellees and no others have an interest therein.

We respectfully submit that the Choctow, O. & G. R. R. Co. case does not support this Court's per curiam opinion in the Large Oil Co. case and did not justify the departure there made from a long line of cases holding that the properties of a private federal instrumentality were subject to a state property tax. The Indian Territory Illuminating Oil Co. case does in part support the Large Oil

Co. case. It is based, however, on the Choctaw. O. & G. R. R. Co. case and is, therefore, without sound basis. In the I. T. I. O. case. Oklahoma sought to impose an ad valorem tax on oil and gas leases covering lands of restricted Osages. The owner of the leases protested the tax on the theory that it was a federal instrumentality and as such immune from the tax. This Court sustained that theory and based its opinion on the proposition that "a tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them." This quotation is from the body of the opinion.

The tax here levied is not on leases. In fact, oil and gas leases are not subject to tax in Oklahoma. See In re: State V. Shamblin, 185 Okla. 126, 90 Pac. (2d) 1053. In fact minerals in place after severance are not subject to tax in Oklahoma, prior to production. See State v. Sham? blin, supra. It follows that no departmental oil and gas lease covering lands of restricted Indians can or will be destroyed by any tax levied by Oklahoma. Repeating, the tax levied is on the properties of the appellees and an imposing thereof cannot destroy the power of the United States to make. leases or the right of the restricted Indian thereunder to take the proceeds accruing from his full 1/8 royalty interest in the production. In brief, no right of the United States nor the Indian can or will be destroyed by the tax here levied. The lessor in an oil and gas lease always has the hope that the properties will be developed. If the lease is destroyed prior to development, then this hope and expectancy is gone. This is apparently the thing that this Court said could be destroyed by the imposing of a tax on oil and gas leases prior to production.

The next case in point of time is the case of Gillespie v. Oklahoma, 257 U.S. 501, 42 S. Ct. 171. Oklahoma there imposed an income tax on income of a lessee. The income accrued from oil and gas produced from wells on the lands of a restricted Creek Indian. The Supreme Court of Oklahoma sustained the tax. On appeal the case was reversed on authority of Choctaw, O. & G. R. R. Co., supra, and the I. T. I. O. case, supra. The Gillespie case was reversed in Helvering v. Mountain Producers, supra.

The next case in point of time is Jaybird Mining Co. V. Weir, 271 U. S. 609 46 S. Ct. 592. An ad valorem tax was there assessed on lead and zinc ores mined by the company in 1920. The ores were mined under a lease covering the restricted lands of Quapaw Indians. At the time the tax was assessed, the ore was in the bins. The tax so assessed was in addition to a gross production tax. "It was assessed on the ores in mass, and the royalties or equitable interests of the Indians had not been paid or segregated." The State Supreme Court sustained the assessment. This Court reversed the case on the authority of the Choctaw. O. & G. R. R. Co. case and the I. T. I. O. case.

The case can be distinguished from the instant case for the reason that the tax was assessed on properties in which a restricted Indian owned an interest. No properties of a restricted Indian are here included in the assessment.

MR. JUSTICE MCREYNOLDS dissented. In his dissent he stated that he believed the tax to be remote and for such reason valid under the authority of Central Pac. R. V. California, 162 U. S. 91, 16 S. Ct. 766. This Court now so holds. We refer to the case of Helvering V. Mountain Producers and other cases of the same purport.

MR. JUSTICE BRANDEIS also dissented. His dissent is based upon the proposition that since the tax imposed was a property tax the imposing thereof should be allowed under a long line of decisions of this Court holding that there is no implied constitutional inhibition against a state imposing a property tax on the properties of a federal instrumentality. He cites many cases from this Court where this Court so held. See Page 617 of the U. S. Report. At the top of the same page he points out that,

"* * And we are dealing with a property tax, 'as distinguished from an occupation tax. * * *"

At page 619 of the same report, he says that,

I suspect that my brethren would agree with me in sustaining this tax on ore in the bins, but for Gillespie V. Oklahoma, 275 U. S. 501, * * *."

As aforesaid the Gillespie case was overruled in the Helvering y. Mountain Producers case. We are hopeful that the late Justice Brandeis' surmise was correct and that this Court will now agree with him and with us on the proposition that a state can impose a property tax on the properties of a private federal instrumentality. This Court has in fact so held repeatedly and consistently in all cases except those cases where the federal instrumentality was brought about through a lease on the lands of restricted Indians.

The next case in point of time is Burnet V. Coronado Oil & Gas Co.. 285 U. S. 393, 52 S. Ct. 443. The Collector of Internal Revenue there imposed an income tax on the income of a lessee. The income accrued from oil and gas produced from wells located on school land owned by the State of Oklahoma. This Court there denied the tax on the theory that the lessee was a state instrumentality. The authority was the Gillespie case, supra. The Coronado case was overruled in Helvering V. Mountain Producers, supra.

MR. JUSTICE STONE dissented. He stated that the Gillespie case should be overruled; that the Gillespie case was in conflict with Group No. 1 Oil Corp. v. Bass, 283 U. S. 279, 51 S. Ct. 432. At Page 404 of the U. S. Report, he points out that there was the exercise of a function concededly governmental; but in each case the only result, so far as the lessee was concerned, was the acquisition by him of certain property rights exclusively for his own benefit, which property rights this Court had always recognized as being taxable except where an Indian oil and gas lease was involved. We quote his language:

"* * In each case there was the exercise of a function concededly governmental; but in each the only result so far as the lessee was concerned, was the acquisition by him of certain property rights exclusively for his own benefit. In each the lessee was taxed on his profits, derived from his private business in the production and sale of oil and gas, which was his property. It cannot be said that the identical tax, thus levied, has any effect on Oklahoma differing from that on Texas. The fact, if it is a fact, that under the Oklahoma leases the lessees do not acquire ownership of the oil or gas until they have severed it from the soil. but before its sale, while the lessees under the Texas leases acquire it immediately on receipt of their leases, presents no distinguishing feature. All acquire private rights by governmental grant, from the exploitation of which they have derived income, which, upon principles consistently applied by this Court, except in the Indian oil lease cases, and reiterated in the Group No. 1 Oil Corporation case, may be taxed as other income is taxed."

In the case of Santa Rita Oil Co. v. State Board of Equalization, 116 Pac. (2d) 1012, the Supreme Court of Montana had under consideration the proposition of whether or not a gross production tax and an operator's net proceeds tax levied by Montana on the 7/8 working interest of a lessee producing oil and gas under a lease covering trust patent Indian land, was impliedly denied under the Constitution. The Montana dourt held that the taxes so levied did not constitute such a direct and substantial interference with the functions of federal government as to be invalid. The basis of this decision was the Mountain-Producers case. The court stated that the Mountain Producers case overruled the Gillespie and Coronado cases "and in so doing necessarily overruled the Choctaw and Jaybird cases and many others like them." We-say that the phrase 'many others like them' included the Large Oil Company case and any other case of the same purport.

We respectfully submit that there is no sound basis for holding that a federal instrumentality is exempt from state property taxes where the federal instrumentality is brought about because of the presence of a restricted Indian and not exempt where the federal instrumentality is brought about through some other reason. We so say for the reason that no property rights of the Indian are involved or affected. The restricted Indian has nothing whatsoever to do with the federal instrumentality except the matter of bringing it into existence. His properties are neither taxed directly nor indirectly.

We submit that since the gross production tax here levied is a property tax imposed on the private property of the appellees, the right to impose the tax has always by this. Court been sustained except in the Indian lease cases herein referred to, which cases were either expressly or impliedly overruled in the Mountain Producers case, that and irrespective of the correctness of our foregoing statement, the tax imposed does not burden a federal instrumentality under the doctrine of Helvering V. Mountain Producers, supra, and on that authority the assessment should be here sustained.

We assert that in the Mountain Producers case this Court completely departed from the line of decisions based on the Choctaw, O. & G. R. R. Co. case, in which decisions it had held that where the federal instrumentality was brought about because of the restricted status of the Indian the tax would be denied because it burdened the federal instrumentality but where the instrumentality was otherwise brought about the tax would not be denied. We also assert that when this Court departed from this erroneous line of decisions it returned to the well established line of

decisions under which it had held that no constitutional implications prohibited a state from imposing a nondiscriminatory property tax on a federal instrumentality merely because it is the property of the agent and used by the agent in conducting his operations as an instrumentality.

PROPOSITION No. 2

The taxes of $\frac{1}{8}$ of 1c, and of one mill, levied on each barrel of oil produced are nondiscriminatory excise taxes that do not burden a federal instrumentality.

There was assessed in addition to the gross production tax discussed under the first proposition, an excise tax of 1/8 of 1/6 on each barrel of oil produced prior to July 1, 1943, and an excise tax of one mill on each barrel of oil produced after that date.

The ½ of 1¢ per barrel tax was assessed under an Act of 1941. See Okla. Sess. Laws 1941, p. 380. The levy was under Section (1) of the Act which later became Sec. 1218.1, Title 68, O. S. 1941. This Act was in effect until June 30, 1943. All excise taxes protested by the Texas Company were paid under this section.

In 1943, the Oklahoma Legislature enacted another Act of the same purport. See S. L. 1943, pp. 189 to 191. The Act became effective July 1, 1943. By the terms of this Act, the levy was one mill on each barrel of oil produced. The levying section was Section (1) of the Act, which later became Sec. 1220.1, Title 68, O. S. 1941, as amended. The Magnolia Petroleum Company was assessed taxes under both the 18 of 1e and the one mill levy.

The levying sections of the above referred to Acts. and for that matter the Acts themselves are in substance the same. It is for this reason that we believe it sufficient to merely set forth the levying section in the Appendix hereto. See Pages 1 to y hereof.

This excise tax is the tax that the parties refer to as the profation tax. These excise taxes were not levied for general revenue purposes. 6 7 of the tax is appropriated to the "Conservation Fund" and the remaining 1-7 to the "Interstate Oil Compact Fund of Oklahoma." The moneys are used by the Conservation Department and the Interstate Oil Compact Commission to defray the general expenses of those agencies in carrying out their functions as conservators of the natural resources of Oklahoma. It is the appellant's position that the restricted Indian benefited through the levy of these taxes. As the owner of land producing oil and gas, it was to his interest that the oil and gas in the pool underlying his land be conserved. If conserved, the ultimate recovery was increased all to his finangial gain. If Oklahoma is permitted to impose this taxi the restricted Indian is benefited. To deny this tax is todeprive the restricted Indian of this benefit.

The Acts hereinbefore referred to were never under consideration by the Supreme Court of Oklahoma prior to the opinions in the instant case. However, a very similar Act was under consideration in the case of Barnsdall Refining Company V. Oklahoma, 171 Okla, 145, 41 Pac. (2d) 919. The Supreme Court of Oklahoma there held

that the tax levied was an excise tax. Oklahoma was there denied the right to impose the tax on oil produced from the lands of Osage Indians.

The decision in the above referred to case was based on the Choctau. O. & G. R. R. Co. case and the line of decisions of this Court following that case. We discussed these cases under our first proposition. The case was appealed to the Court and affirmed. See 296 U. S. 521, 56 S. Ct. 340. The style on appeal to this Court was, of course, reversed. The opinion of this Court in that case is based on the same line of decisions followed by the Supreme Court of Oklahoma. It is our position that these decisions were either expressly or impliedly overruled in the Mountain Producers case.

In the Mountain Producers case this Court held that the imposing of a federal net income tax on the income of a lessee accruing from oil produced from lands owned by a state, did not burden a state instrumentality thus created, or the exact opposite of what it had held in the Coronado case, supra.

We suggest that it is here unnecessary to determine whether or not a net income tax is an excise tax or a property tax. A majority of the courts hold that a net income tax is an excise tax. See Page 308 and Page 319 of 27 Mmer. Jur. If the tax here under discussion be construed to be a property tax, the imposing thereof has always, by this Court, been permitted, excepting only in the Indian lease cases referred to in our first proposition. If the taxes

be construed to be excise taxes, then the imposing thereof is permitted under the authority of the Mountain Producers

See also:

New York V. United States. 326 U.S. 572, 66 S. Ct. 310.

It is frue that the denomination "excise tax" is not very descriptive at this time. This name is now applied to all taxes that are not poll or property taxes. The tax under discussion is not a license or an occupation tax and would in fact clearly be a property tax if it were not for the fact that it does not have the essential advalorem factor—the tax is not measured by value. It is in-fact a direct property tax on the oil produced that does not have an advalorem factor. See Sec. 33, 51 Åm. Jur., pp. 61-62. In Dawson v. Kentucky Distillers and Warehouse Co., 255 U.S. 288, 41 S. Ct. 272, this Court held that a tax of 50c a gallon on whiskey was a property tax and not an occupation tax.

In Buckstaff Bath House Co. v. McKinley. 308 U.S. 358, 60 S. Ct. 279, this Court held that a corporation operating a bath house as a private business for profit on a federal government reserve under a lease from the Secretary of the Interior, under which lease it was regulated by said Secretary as to number of bath tubs that might be used, the charge made to the public for service, the qualification of employees, the maintenance and care of the premises, etc. was not exempt from an excise tax levied by the State

of Arkansas in connection with the Arkansas Employment Compensation Act.

PROPOSITION No. 3

The taxes here imposed are nondiscriminatory taxes that do not burden a federal instrumentality. The effects of the taxes upon the Federal Government, if any, are extremely remote and inconsequential.

The taxes here assessed are nondiscriminatory taxes that do not burden the United States in any way, nor do they burden the restricted Indian. The taxes are not on or collected from properties of either the restricted Indian or the United States. It is to be remembered that it is not even necessary for the United States to engage in any form of administrative work because the taxes are imposed. As we have heretofore stated, the taxes are on the properties of the lessee. The matter of paying the taxes is wholly a matter between the appellees and Oklahoma. If the taxes are not paid, no properties of the United States or of the restricted Indian will be sold to satisfy the tax liability.

The only case that we have found that attempts to state wherein the tax has any effect upon a restricted Indian is the case of Gillespie V. State of Oklahoma, supra. This Court there stated that an income tax upon the net income of a lessee was "a direct hamper upon the efforts of the United States to make the best terms it can for its wards." In brief, by exempting the lessee from all state taxes a better bonus price could be obtained when the Indian's lease

was put up for sale. We say that whether this is true or not, is conjectural. It is only a small portion of lands that/ are leased for oil and gas that ever prove productive. This being true, it is doubtful if the taxability or the absence thereof influences the price paid for the lease. Assuming it does influence the bonus price, is the amount thereof sufficient to offset the direct benefits the Indian receives from the State as the result of the State collecting the taxes? For example benefits in the form of schools, highways, etc. It seems to us that this line of reasoning is in effect this: The lessee is relieved from paying taxes to the State of Oklahoma and as a direct result of being so relieved, a portion of the taxes that it would otherwise pay to Oklahoma are indirectly passed back to the Indian in the form of an increased bonus price for the Indian lease. If Congress undertook to accomplish this by legislation, we submit that such legislation would be quickly struck down by this Court. It is to be remembered that the Gillespie case was reversed by the Mountain Producers case and we trust that this line of reasoning is no longer followed by this Court.

In Smith v. Davis. 322 U. S. 111. 65 S. Ct. 157, this Court appears to have considered the proposition of whether or not a state tax imposed on one of its contractors should be denied for the reason that the United States government could make a more advantageous contract with contractors if they were relieved from paying state taxes. This Court refused to follow such a theory. This is clearly reflected from the following quotation taken from Page 116 of the U. S. Report:

The assets of an independent contractor that are derived from the profits of a government contract stand in no preferred constitutional position so far as taxation is concerned. They too must bear their fair share of the tax burden. And as long as that burden is non-discriminatory, there is no basis for assuming that contractors will be any less willing to enter into construction contracts with the United States. Nor is such a tax likely to affect or impair in any way their ability to discharge their duties efficiently. There is thus no practical reason for immunizing open accounts of this nature from taxation.

In State of Alabama V. King & Boozef. 314 U. S. 1. 62 S. Ct. 43, this Court held that the imposing of a sales tax on purchases made by contractors under a government contract would not be denied even though the tax was in fact passed on to the United States.

This brief is probably already too voluminous. It is for this reason that we will merely cite, and in some instances quote from, cases handed down by this Court in recent years that conclusively establish that this Court is now committed to the proposition that the right of a state to impose a nondiscriminatory tax upon a federal instrumentality will not be denied where the tax does not directly burden the instrumentality. The leading case is probably the case of Helvering v. Mountain Producers, supra. At Page 358 of the U. S. Report, this Court held:

"In numerous decisions we have had occasion to declare the competing principle, buttressed by the most cogent considerations, that the power to tax should not be crippled by extending the constitutional exemption from taxation to those subjects which fall within the general application of nondiscriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only remote, if any, influence upon the exercise of the functions of government. Willcuts v. Bunn. 282 U.S. 216, 225, 51 S. Ct. 125, 127, 75 L. ed. 304, 71 A.L.R. 1260, and illustrations there cited. * * *

Following the above quotation, this Court cites cases handed down by it that conclusively show that the trend is away from exempting a federal instrumentality from nondiscriminatory state taxes.

Fox Film Corporation V. Doyal et al., 286 U. S. 123, 52 S. Ct. 546, antedates the Mountain Producers case. At Page 128 of the U. S. Report, this Court held in the Fox Film case that immunity from nondiscriminatory state taxes does not exist where no direct burden is laid upon the governmental instrumentality, and it is only a remote, if any, influence upon the exercise of the functions of government.

U. S. 598, 63 S. Ct. 1284, Oklahoma was permitted to impose an estate tax on the estates of restricted Indian members of the Five Civilized Tribes. At Page 610 of the U. S. Report, this Court says that:

Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism. Graves v. New York ex rel. O'Keefe, 306 U. S. 466, 59 S. Ct. 595, 83 L. ed. 927, 120 A.L.R. 1466, permitted States to impose income taxes upon government employees and Helvering v. Gerhardt, 304 U. S. 405, 58 S. Ct. 969, 82 L. ed. 1427, permitted the federal government to impose taxes on state employees. O'Malley v. Woodrough, 307 U. S. 277, 59 S. Ct.

838. 83 L. ed. 1289. 122 A.L.R. 1379; overruled a previous design which held that studges should not pay taxes just as other citizens and Helvering V. Mountain Producers Oil Corp., supra, repudiated former decisions seriously limiting state and federal power to tax. See, also, Melcalf & Eddy V. Mitchell. 269 D. S. 514, 46 S. Ct. 172, 70 L. ed. 384, and James V. Dravo Contracting Co., 302 U. S. 134, 58 S. Ct. 208, 82 L. ed. 155, 114 A.L.R. 318. The trend of these cases should not now be reversed."

In New York v. United States, 326 U.S. 572, 66 S. Ct. 310, the State of New York invoked the instrumentality rule in connection with the nondiscriminatory excise tax levied by the federal government on waters produced from a spring owned by the State of New York. The tax was sustained. At Page 581 of the U.S. Report, this Court said:

* * * in the older cases, the emphasis was on immunity from taxation. The whole tendency of recent cases reveals a shift in emphasis to that of limitation upon immunity."

At Page 378 of the U.S. Report in the above referred to case, this Court cites the Mountain Producers case with approval and also cites other cases from this Court that sustain our position here.

No claim is here made that Congress has expressly denied unto Ohlahoma the right to impose the taxes assessed. In Ohlahoma Tax Commission V. United States, supra, this Court held that tax exemptions are not granted by implication and if Congress intended to exempt the estate of the Indian from estate taxes it should say so in plain words. The Court there cites Superintendent V. Commisapproval therefrom as follows:

"Wardship with limited power over his property' did not then without more, render [the Indian] immune from the common burden."

We, therefore, say that the fact that the appellees are to some extent regulated by the federal government, does not render their properties immune from the common burden.

PROPOSITION No. 4

There can be no implied immunity from the taxes assessed where the mineral interests were owned by non-Indians or unrestricted Indians.

We have proceeded so far or the theory that the appellecs are federal instrumentalities where the lands of restricted Indians are involved. We have so proceeded because of the line of decisions of this Court where it has so held. It is true, generally speaking, that most of these cases were either expressly or impliedly overruled in the Mountain Producers case. However, we do not contend that the Mountain Producers case overruled these cases on the proposition that an entity occupying the position here occupied by the appellees is not a federal instrumentality. We suggest, and notwithstanding these opinions, it is extremely doubtful whether the appellees are in fact federal instrumentalities. Their functions and relations toward a restricted Indian are in no wise different from their functions and relations toward a non-Indian. They are admittedly engaged as private corporations in business for profit, and

they so engage whether the owner of the minerals be a restricted Indian or a non-Indian. This is established by the fact that upon the Indian's restrictions being removed the oil company continues to operate and perform the same functions - produces and sells oil and gas and accounts. to the owner of the minerals - the same after the removal of the restrictions as it did before. The appellees will say that they are regulated. This was the contention made by the lessee in the Buckstaff Bath House Co. V. McKinley case, supra. This Court there held that the imposing of regulations by the federal government did not make the lessee a federal instrumentality. We submit this Court should so hold here. The regulations here imposed by the federal government are in substance the same as those imposed by Oklahoma on all producers of oil and gas. In fact, if they " comply with the regulations imposed by Oklahoma they automatically comply with the regulations imposed by the federal government. We know of no line of decisions that holds that an oil company is an instrumentality of a state merely because it is regulated in the production phase of its business by the state.

Irrespective of the contention above made, this Court has held that the right to impose nondiscriminatory taxes such as here assessed, will not be denied a state where Congress has expressly consented to an imposing of the taxes on the interest owned by the Indian. It is true that Congress has not here expressly consented, but the 1/2 interest of the non-Indian Juana Pau Kune in Case No. 751.

(Mag. R. 18), and the 1/4 interest owned by the heirs of Kla-da-ing, Case No. 1750 (Mag. R.:14). [the deed conveying a fee simple unrestricted title of the heir. Mag. R. 64-65], surely takes the same status as does the interest of the restricted Indian, where consent to tax his interest has been given by Congress. The correctness of our contentions is established in the case of British American Oil. Producing Co. v. Board of Equalization of the State of Montana, 299 U.S. 159, supra, where this Court held that the State of Montana would be permitted to impose a gross production tax and a net proceeds tax on the interest of the lessee under a departmental lease covering certain lands of members of the Black Feet Tribe. The lands of the Black Feet were not subject to alienation, but Congress had given its consent to the imposition of the taxes on the interest of the Indians.

See also:

Carter Oil Co. v. Oklahoma Tax Commission, 166 Okla. 1, 25 Pac. (2d) 1092.

In Penn Dairies, Inc. v. Milk Control Commission, 318 U. S. 261, 63 S. Ct. 67, this Court held at Page 269 of the U. S. Report that.

render services to the government are not such agencies and do not perform governmental functions. * * *'

and cited a number of cases sustaining the rule of law announced. The lessees here admitted do no more than render a service to the United States government.

. It is our position that the taxes here assessed do not directly burden a federal instrumentality and for such rea-

son the assessments should be sustained in their entirety. If in this we be in error, then we say that at least Oklahoma should be permitted to impose the taxes here to the extent that the mineral rights are owned by non-Indians and non-restricted Indians.

PROPOSITION No. 5

Tax exemptions are not granted by implication.

This Court has repeatedly and consistently held that tax exemptions are not granted by implication. In Ohlahoma Tax Commission V. United States, supra, this Court at 606 U. S. Report, expressed itself in the following language:

"This Court has repeatedly said that tax exemptions are not granted by implication. United States Trust, Co. v. Helvering, 307 U. S. 57, 60, 59 S. Ct. 692, 693, 83 L. ed. 1104; * * *"

and there refused to hold that the estates of members of the Five Civilized Tribes of Indians were exempt from an Oklahoma estate tax.

In Heiner v. Colonial Trust Co., 275 U. S. 232, 48 S. Ct. 65, the respondent, Colonial Trust Co., as the executor of the estate of Glenn T. Braden, deceased, contended that Braden as the owner of a producing oil and gas lease covering certain lands of the Osage Tribe of Indians was a federal instrumentality and as such his income accruing from the lease was exempt from federal income taxes. The respondent also urged that the Indian lessors were exempt from such tax and for such reason Braden's income was

impliedly exempt. This Court held that the income was subject to tax. At Page 235 of the U. S. Report, the basis for this holding is given in the following language:

the income tax, as contended, the fact that they are wards of the government is not a persuasive reason for inferring a purpose to exempt from taxation the income of others derived from their dealing with the Indians. Tax exemptions are never lightly to be inferred [Vicksburg, etc., R. R. V. Dennis, 116 U. S. 665, 668, 6 S. Ct. 625, 29 L. ed. 770: Philadelphia & Wilmington, R. R. V. Maryland, 10 How. 376, 393; 13 L. ed. 461], and we think any implication of an exemption of the income of the Indians themselves, if made, must rest on too narrow a basis to justify the inclusion of the income of other persons merely because the statute, if applied as written, may have some perceptible economic effect on the Indians.

We respectfully assert that no well founded reason can be presented in support of the appellees contention that they are entitled to be impliedly exempt from the taxes here assessed. The appellees received and enjoyed the same benefits from the State of Oklahoma as did their competitors who did not happen to be producing oil and gas from the lands of restricted Indians. For such reason, no tax favoritism should be bestowed upon the appellees. Our position is succinctly stated in Oklahoma Tax Commission v. United States, supra, as follows:

"Recognizing that equality of privilege and equality of obligation should be inseparably associated, we have recently swept away many of the means of tax favoritism. * * *"

CONCLUSION

The taxes here assessed were neither levied nor assessed on the properties of the United States government or of any restricted Indian. The effect of the levy and assessment, on the federal government, is extremely remote and inconsequential. The taxes do not burden the appellees as federal instrumentalities and do not deprive them of the power to serve the federal government as it was intended they should serve it. The decision of the Supreme Court of Oklahoma to the contrary should be reversed.

Respectfully submitted.

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JULY, 1948.

APPENDIX T

Section 821. Title 68, O. S. 1941, of the Oklahoma Gross Production Statutes reads as follows:

"Every person, firm, association or corporation engaged in the mining or production, within this State, of the aforesaid asphalt, or of ores bearing lead, zinc, jack, gold, silver, or copper, or of petroleum or other crude oil or other mineral oil, natural gas and or casinghead gas, shall, monthly file with the Oklahoma Tax Commission, a statement under oath, on forms prescribed by it, showing the location of each mine or oil or gas well operated or controlled by such person. firm, corporation or association during the last preceding monthly period; the kind of such mineral, oil or gas produced: the gross amount thereof produced; and the actual cash value thereof at the time and place of production, including any and all premiums received from the sale thereof; the amount of royalty payable; thereon; and, where such royalty is claimed to be exempt from taxation by law, the facts on which such claim of exemption is based, and such other information pertaining thereto as the Oklahoma Tax Commission may require, and shall, at the same time pay to the Oklahoma Tax Commission, a tax equal to three-fourths of one per centum on the gross value of asphalt, ores bearing lead, zinc, jack, gold, silver and copper produced which is hereby levied and a tax equal to five per centum of the gross value of the production of petroleum or other crude or mineral oil? which is hereby levied based on 42 U. S. gallons of 231 cubic inches per gallon, computed at a temperature of 60 degrees Fahrenheit for oil measurements and a tax equal to five per centum of the gross value of the production of natural gas and/or casinghead gas. which is hereby levied: Provided, however, that none of the provisions of this Act shall be construed to affect or impair the liability imposed upon the purchaser of petroleum crude oil or other mineral oil, natural gas and/or casinghead gas, by any law or laws

of the State of Oklahoma relating to the payment of gross production taxes by the purchasers of such petro-leum crude oil or other mineral oil, natural gas and/or casinghead gas.

The tax hereby levied shall so attach to, and is levied on, what is known as the royalty interest; and the amount of such tax shall be a lien on such interest.

The Oklahoma Tax Commission shall have power to require any such person, firm, corporation or association engaged in mining or the production and or purchase of such asphalt, mineral ores aforesaid, petroleum or other crude oil or other mineral oil, natural gas and or casinghead gas, or the owner of any royalty interest therein to furnish any additional information by it deemed to be necessary for the purpose of correctly computing the amount of said tax; and to examine the books, records and files of such person, firm, corporation or association; and shall have power to conduct hearings and compel the attendance of witnesses, and the production of books, records and papers of any person, firm, association or corporation.

"Any person or any member of any firm or association, or any officer, official, agent or employee of any corporation who shall fail or refuse to testify; or who shall fail or refuse to produce any books, records or papers which said Oklahoma Tax Commission shall require; or who shall fail or refuse to furnish any other evidence or information which said Oklahoma Tax Commission may require; or who shall fail or refuse to answer any competent questions which may be put to him by said Oklahoma Tax Commission, touching the business, property, assets or effects of any such person, firm, association or corporation, relating to the gross production tax imposed by this or other Acts, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than \$500.00, or imprisonment in the jail of the county where such offense shall have been committed, for not more than one year, or by both such fine and imprisonment; and each day such refusal on the part of

such person shall constitute a separate and distinct offense.

"The Oklahoma Tax Commission shall have the power and authority to ascertain and determine whether or not any return berein required to be filed with it is a true and correct return of the gross products, and of the value or volume thereof, of such person, firm, corporation or association engaged in the mining. or production of asphalt and ores bearing minerals aforesaid and of petroleum or other crude oil or mineral oil and of natural gas and/or casinghead gas; and if any person, firm, corporation or association has made an untrue or incorrect return of the gross production or value or volume thereof, as hereinbefore required, or shall have failed or refused to make such return, the Oklahoma Tax Commission shall under rules and regulations prescribed by it, ascertain the correct amount of either, and compute said tax.

The payment of the taxes herein imposed shall be in full, and in lieu of all taxes by the State, counties, cities towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon producing leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver, or copper, or for petroleum or other crude oil or other mineral oil, or for natural gas and/or casinghead gas, upon the mineral rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil, or natural gas and/or casinghead gas, or any mine producing asphalt or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or other property hereinbefore in this paragraph mentioned or described; and any interest in the land, other than that herein enumerated, and oil in storage, asphalt and ores

bearing minerals hereinbefore named, mined, produced and/or on hand at the date as of which property is assessed for general and advalorem taxation for any subsequent tax year, shall be assessed and taxed as other property within the taxing district in which such property is situated at the time.

No equipment, material or property shall be exempt from the payment of ad valorem tax by reason of the payment of the gross production tax as herein provided except such equipment, machinery, tools, material or property as actually necessary and being used and in use in the production of asphalt or of ores bearing lead, zinc, jack, gold, silver or copper or of petroleum or other crude oil, or other mineral oil or of natural gas and casinghead gas; and it is expressly declared that no ice plants, hospitals, office buildings, garages, residences, gasoline extraction or absorption plants, water systems, fuel systems, rooming houses and other buildings, nor any equipment or material used in connection therewith shall be exempt from ad valorem tax.

The State Board of Equalization, upon its own initiative, may, and upon complaint of any person who claims that he is taxed too great a rate hereunder, shall, take testimony to determine whether the taxes herein imposed are greater, or less than the general ad valorem tax for all purposes would be on the property of such producer subject to taxation in the district or districts where the same is situated and also the value of oil, gas, asphalt or any of the said mineral ores produced and any other element of value in lieu of which the tax herein is levied. The said board shall have power and it shall be its duty to raise or lower the rates herein imposed to conform thereto. An appeal may be had from the decision of the State Board of Equalization thereon, by any person aggrieved to the Supreme Court, in like manner and with like effect as provided by law in other appeals from said Board to said court; provided, that after such tax has been collected and distributed, or paid without protest, no complaint with reference to rate thereof shall be heard or con-

APPENDIX II

Section 1220.1, Title 68, O. S. 1941, under which the petroleum or excise tax was levied, reads as follows:

"There is hereby levied an excise tax of one (1) mill per barrel on each and every barrel of petroleum oil produced in the State of Oklahoma, which is subject to Gross Production Tax in the State of Oklahoma. Such excise tax of one (1) mill per barrel shall be reported to and collected by the Oklahoma Tax Commission at the same time and in the same manner as is now provided by law for the collection of gross production tax on petroleum oil. On petroleum oil sold at the time of production, the excise tax thereon shall be paid by the purchaser, who is hereby authorized to deduct in making settlement with the producer and/or royalty owner the amount of tax so paid; provided that, in the event oil on which such tax becomes due is not sold at the time of production, but is retained by the producer, the tax on such oil not so sold shall be paid by the producer for himself, including the tax due on royalty oil not sold; provided further, that in settlement with the royalty owner, such producer shall have the right to deduct the amount of tax so paid on royalty oil, or to deduct therefrom royalty oil equivalent in value at the time such tax becomes due with the amount of tax paid. Laws 1947, P. 462,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1948

Nos. 40 and 41

OKLAHOMA TAX COMMISSION.

Petitioner:

VERSUS

THE TEXAS COMPANY,
Respondent;

OKLAHOMA TAX COMMISSION.

Petitioner,

VERSUS

MAGNOLIA PETROLEUM COMPANY, Respondent.

REPLY BRIEF

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NOVEMBER, 1948.

KING LAW BRIEF COMPANY, 418 NORTHWEST, THIRD, OKLAHOMA CITY-PHONE 3-2969



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MAGNOLIA PETROLEUM COMPANY

Respondent:

REPLY BRIEF

At the conclusion of the oral argument in the above cases, the Court graciously allowed our request for leave to file a reply brief herein.

THE RESPONDENTS ARE NOT FEDERAL INSTRUMENTALITIES

We suggest at pages 41" and 42 of our original brief that it was extremely doubtful whether the respondents were in fact federal instrumentalities. We there pointed out that the record failed to disclose any substantial difference between the services rendered by respondents under départmental leases and those rendered under non-departmental leases. We also pointed out that the record failed to disclose wherein the respondents were more fully and rigorously regulated when operating under departmental leases than when operating under nondepartmental leases. We approached this issue hesitantly for the reason this Court held in Choctaw O. & G. R. R. Co. v. Harrison, 235 U.S. 292; and in subsequent opinions based thereon, that lessees rendering services under a departmental lease were federal instrumentalities. Another reason we so approached the issue was that the Government had not spoken and made known its position. The Federal Government through the Solicitor General has now spoken in an amicus curiæ brief filed herein. Therein the claim of federal instrumentality asserted by respondents is emphatically denied.

The question of whether or not an agency performing services for the Federal Government is in fact a federal instrumentality is a question of fact. The mere fact that the agency performs services does not within itself make it a federal instrumentality. See Shaw v. Gibsop-Zahniser Oil Corporation. 276 U.S. 575, and Metcalf & Eddy v. Mitchell. 369 U.S. 514. The immunity granted to an

agency is granted for the sole purpose of protecting the Government and will not be extended further than necessary to effect that purpose. I. T. I. O. Co. v. Board of Equalization, 288 U.S. 325. In referring to this last mentioned rule, the Court pointed out in James v. Dravo Contracting. Co., 302 U.S. 134, 158, that the right of implied immunity in an agency performing services for the Government is a derivative one and as we read the opinion, the claim will probably be denied where the Government disclaims the immunity. This statement is based upon the following quoted portion of the opinion:

Government, and respondent's right is at best a derivative one. He asserts an immunity, which, if it exists, pertains to the Government which the Government disclaims.

The respondents are not creatures of Congressional legislation. They are private corporations engaged in business for profit. Their claim to the status of federal instrumentality is based solely upon the proposition that they perform a service in which the Federal Government is interested and in the performance of which they are regulated.

We asserted in our original brief that the respondents are as fully and completely regulated in their operations under a nondepartmental lease as they are under a departmental lease. In support of this statement, we direct the Cc rt's attention to the rules of the Corporation Commission of the State of Oklahoma and of the applicable Oklahoma statutes. The rules of the Corporation Commission

in effect when the taxes here assessed accrued, are set forth at length in Appendix 1 hereof. We wish to briefly summarize these rules

Rule 13, provides that the lessee must give notice of intention to drill: Rule 30 provides for reports on wells shot: Rule 37, provides that the lessee must keep and file a copy of the well's log and by Rules 37 and 38, well records must be kept and made accessible to the State's representative: Rule 32, provides that the flow of gas must be restrained to 25% of the potential production: Rule 12. provides that the lessee must use every possible precaution to prevent waste of oil or gas. Rule 17, provides that adequate precaution must be made to keep wells under control: Rule 33, requires that notice of fires be given: Rule 18, provides for the maintaining of separate slush pits: Rules 19, 20 and 25: provide that fresh water must be shut off and that oil and gas sands be protected: Rule 14. provides for plugging wells and how wells shall be plugged, etc.

Sections 81 to 279. Title 52, O. S. 1941, provide comprehensive and effective measures for the conservation of oil and gas produced in Oklahoma. It was under the terms and provisions of these sections of the statute that the Corporation Commission on June 25, 1941, held a hearing in connection with the application of the Texas Company for an order directed to the conserving of oil and gas then being produced from what is generally known as the 'Apache Pool.' In this field are located the oil and gas properties involved in the Texas case. At the hear-

ing, the United States Geological Survey was represented by E. M. Pilkinton. In consideration of the evidence in troduced at the hearing, the Corporation Commission made and entered an order dividing the field into drilling units of twenty acres each: ordered that the surface casing and the second string or flow string be set in a certain manner and cemented; that the tubing used should not exceed $2\frac{1}{2}$ inches, and that the plan of setting casing should be submitted to and approved by the Corporation Commission. This order was permitted to become final.

April 21, 1942, a hearing was had on the application of the State Conservation officers to amend the above referred to order. Both the Texas Company and the Geological Survey appeared at this haring. The Corporation Commission amended the order of June 25, 1941, so as to provide for operating measures that would protect the Permian-Sand, Viola Lime and Hunton Lime horizons of the field. This order was permitted to become final.

In connection with the Paukune properties located in what is generally known as the 'East Cement Field,' which property is involved in the Texas case, the Corporation Commission, in 1943, entered an order directed to the matter of ascertaining the potential production of the wells in the field and further ordered that none of the wells should be permitted to produce more than 25% of their potential. This order was permitted to become final.

The proceedings before the Corporation Commission and the actions taken by that body disclose that: (1) The

State of Oklahoma was in a position to regulate and control respondents in producing oil and gas from the properties here involved: (2) that Oklahoma was not only in a position to so regulate and control it but did do do: and. (3) that the Geological Survey apparently acquiesced in the actions of the Corporation Commission.

The Geological Survey was not in a position to effectively conserve the oil and gas being produced from the fields in which the properties here involved are located. This is true for the reason that the Geological Survey had no jurisdiction over non-Indian lands of unrestricted Indians. To effectively conserve the production of oil and gas, it is of course, necessary that the entire field be regulated and since the Corporation Commission was the only authority in a position to do this, it is only natural that the regulation and control of the fields was turned over to the Corporation Commission.

The rules and regulations of the Corporation Commission attached hereto are not incorporated in the record. However, in the case of State ex rel. Murphy.v. Coca-Cola Bottling Co., 190 Okla, 590, 126 Pac. (2d) 86, the Supreme Court of Oklahoma held that it would take judicial notice of the rules and regulations prescribed by an executive branch of the Government. The orders of the Corporation Commission that are herein referred to are not contained in the record. These orders covered entire oil fields, and, therefore, affected a great number of people. It is for this reason that we assume that the lower tribunals

could properly have taken judicial knowledge of these orders. Since the lower tribunals could have taken judicial knowledge of the things above referred to, this Court on appeal can do so. See 20 Amer. Jur., page 63. Sec. 40.

This Court has consistently and repeatedly held the fact that a contractor or a lessee is regulated, does not make it a federal instrumentality.

See:

Buckstaff Bath House Co. V. McKinley: 308 U.S. 358, 363:

James V. Dravo Contracting Co.: 302-U.S. 134, 149:

Alabama V. King & Boozer. 314 U.S. 1. 13.

(0)

Petitioner did not admit any conclusions plead by the Texas Company.

The Texas Company suggests that the respondents admitted the allegations of its petition to the effect that it was a federal instrumentality and that the taxes assessed burdened it as such. As we heretofore pointed out, the proposition of whether or not entity is a federal instrumentality is a question of fact and this is also true on the proposition of whether or not a tax in fact burdens. It follows that the allegations of the petition to the effect that the Texas Company was a federal instrumentality and that the taxes assessed burdened it, were mere conclusions on the part of the pleader and as such were not admitted on demurrer.

Sec: >

Wright et al. v. State ex rel. Walcon. 104 Okla. 57, 230 Pac. 268; Holway v. World Publishing Co... 171 Okla. 306, 44 Pac. (2d) 881.

11

THE RULE OF LAW ANNOUNCED IN THE MOUNTAIN PRODUCERS' CASE WAS NOT LIMITED TO INCOME TAX CASES

In Helvering V. Mountain Producers Corp., 303 U.S. 376, 385, this Court laid down a broad comprehensive rule of law to the effect that the right to impose a non-discriminatory tax would not be denied where.

** * no direct burden is laid on the governmental instrumentality, and there is only remote, if any, influence upon the exercise of the functions of government."

The respondents contend that the rule so announced was limited to income tax eases: that this Court in effect merely held that there had been an unwarranted extension of the doctrine of implied immunity to income taxes. This construction is contrary to the plain language of the opinion: to the construction of the dissenting Justices; to the construction placed on the opinion in subsequent opinions of this Court and to the construction of the Supreme Court of Montana in Santa Rita Oil Company. V. State Board of Equalization. 116 Pac. (2d) 1012.

The Mountain Producers' case is cited with approval in the following cases:

Oklahoma Tax Commission v. United States. 319 U.S. 598. 610, where Oklahoma was permitted to impose an estate tax on the estates of members of the Five Civilized Tribes. The Court there said that:

** * repudiated former decisions, seriously limiting the state and federal power to tax: * *

New York v. United States. 326 U.S. 572, 581, where a federal excise tax imposed on water bottled by the State of New York from springs by it owned, was sustained, the Court stated:

"In the older cases the emphasis was on immunity from taxation. The whole tendency of recent cases reveals a shift in emphasis to that of limitation upon immunity: * * *."

West v. Oklahoma Tax Commission. 68 S. Ct. 1223. 1228. where Okkahoma was permitted to impose an estate tax on the estates of members of the Osage Tribe. the Court stated:

Moreover, express repudiation was made of the concept that these restricted properties were federal instrumentalities and therefore constitutionally exempt from estate tax consequences. See also: Helvering. V. Mountain Producers Corporation. * * *

111.

THE OKLAHOMA LEGISLATURE HAS NOT INTERPRETED THE GROSS PRODUCTION TAX ACT AS NOT APPLYING TO RESPONDENTS

The respondents contend that by the terms of a 1925 Act of the Oklahoma Legislature, which Act appears at Section 832. Title 68. O. S. 1941, the Oklahoma Legis-lature in effect interpreted the Gross Production Tax Act as not applying to them here. The above referred to Section of the statute is quoted in the footnote at Page 21 of the Texas Company's brief. In substance the Section provides that in all cases of overpayment, duplicate payment or payment made in error on account of the production being derived from restricted Indian lands and therefore exempt from taxation, the State Auditor shall refund the taxes:

... It is our position that the above referred to Section is nothing more than a refund provision. It is apparent from the language employed that the Legislature appreciated that in some instances, production from restricted Indian lands was taxable and in other instances it was not. The Legislature, therefore, merely provided that in those instances where the production was not taxable, that a refund should be made. It did not pretend to enumerate the instances in which the production would be non-taxable. The respondents do not contend that the sections of the Gross Production Act under which the taxes in the instant cases were levied are ambiguous and since there is no ambiguity, the statutes will be construed solely in accordance with the language therein used. Among the many cases where the Supreme Court of Oklahoma has so held; is Board of Equalization of Oklahoma V. Bonner. 185 Okla. 431, 93 Pac. (2d) 1077. We also wish to point out that the effect of respondents' contention is that the

This, we deny, but if this it is, then it is to be strictly construed. The Supreme Court of Oklahoma so held in the Bonner case, supra.

The contention now made by respondents is wholly. inconsistent with the construction that they have placed on the Gross Production Tax Act. The construction that we refer to, arises from the fact that the Magnolia Petroleur. Company voluntarily paid the gross production and proration tax accruing on all properties involved in its case from March 7, 1938, to May 31, 1941, and has at no time sought a refund of these taxes. The Texas Company paid both the gross production and the proration tax on the properties involved in its case from the date production was first brought in, to August 31, 1942. Production on the Maynahonah and Mulkehay leases was brought in in December, 1941, and on the Achilta lease in January, 1942. We attach hereto as Appendix 2, a photostatic copy of a certificate of the Oklahoma Tax Commission showing the facts above referred to.

We do not contend that the fact that respondents voluntarily paid the taxes during the period of time here-inbefore set out, is any proof that they owe the taxes for which they here seek recovery, but we do insist that their actions in voluntarily paying the taxes can and should be considered in evaluating their argument to the effect that the Legislature did not intend to impose a tax on their properties.

IV.

SILENCE OF CONGRESS DOES NOT IMPLY IMMUNITY

The respondents insist that since Congress has not expressly consented to the imposing of gross production and proration taxes on the production from the lands of members of Wild Tribes, that this spells immunity on their parts from the taxes here assessed. This contention was considered in Graves et al. v. People of State of New York. 306 U.S. 466, 476, and rejected in the following words:

It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the Congressional purpose. The nature and extent of that implication depends upon the nature of the Congressional power and the effect of its exercise. But there is little scope for the application of that doctrine to the tax immunity of governmental instrumentalities. The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government. So far as the implication rests upon the purpose to avoid interference with the functions of the taxed government or the imposition upon it of the economic burden of the tax, it is plain that there is no basis for implying a purpose of Congress to exempt the federal government or its agencles from tax burdens which are unsubstantial or which courts are unable to discern. Silence of Congress implies immunity no more than does the silence of the Constitution. It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of · Congress to create an immunity.

The respondents refer to a number of Congressional Acts under which consent was given to impose severance taxes on oil and gas produced from the lands of certain . Indian Tribes. A number of these Acts are cited at Pages 31 and 32 of the Solicitor General's Amicus Curiæ Brief. In addition to the Acts there gited, we direct the Court's attention to an Act of May 29, 1924, 43 Stat. 244, 25 U.S.C.A. 398, by the terms of which consent was given to impose a tax on the oil, gas and other minerals produced from unalloted lands on Indian reservations. seems to us that in this last mentioned Act and in all of the other Acts, it is obvious that Congress had in mind and was legislating in connection with the property rights of the Indian and not of the Jessee producing from his lands. The Indian is the ward of the Federal Government and not the lessee." The fact that the social and economic condition of the several tribes of Indians varies is not subject to dispute. This is not true of lessees as a class. Their economic conditions, generally speaking, do not vary. It is for these reasons that we suggest that no intent should be imputed to Congress to make the lessee's properties subject to tax when the lessed is producing from unallotted. lands on reservations and not subject to tax when producing from the allotted lands of members of the Wild Tribes.

Government ownership of the lands would not defeat the taxes here assessed.

During the oral argument. Mr. Chief Justice Vinson inquired of counsel whether or not ownership of the lands in the Federal Government would defeat the taxes here assessed. We submit that this query was directly answered in the negative in Wilson v. Cook. 327 U.S. 474, 482. The State of Afkansas there imposed a severance tax on a contractor cutting and taking timber from lands of the United States. This Court sustained the tax on authority of James v. Dravo Contracting Co., supra, and Alabama v. King & Boozer, supra.

We wish to point out that the contractor in the Wilson v. Cook case was regulated by the Federal Government. This is apparent by Secs. 221.1. 221.29. Title 36. Code of Federal Regulations. As a matter of fact, all contractors and lessees performing services for the Federal Government are regulated.

THEORETICAL AND SPECULATIVE BENEFITS WILL NOT

The respondents assert that the Indians would be directly benefited through a striking down of the taxes here imposed. This argument is based on the theoretical assumption that (1) the Indians would receive a greater amount as a bonus when their oil and gas leases were put

from taxes; and (2) if the lessees are relieved from the taxes here imposed it might be possible to profitably produce a stripper well for a longer period of time and thus produce more oil. In Helvering V. Mountain Producers Corp., 303 U.S. 376; State of New York V. United States. 326 U.S. 572, 577; Helvering V. Gerhardt. 304 U.S. 405. 460, and Graves et al. V. New York, 306 U.S. 466, 484, this Court held that regard must be had to substance and direct effects and that theoretical and speculative conceptions of interference and burdens will not be considered.

VI.

COMMERCE WITH INDIAN TRIBES IS NOT HERE SHOWN

Mr. R. O. Mason and Mr. Hayes McCoy have filed herein an Amicus Curiæ brief. They therein point out that Congress under Sec. 8. Art. 1 of the Constitution of the United States has power "to regulate Commerce." * with the Indian tribes." and assert that since Congress has not here given express consent to imposing the taxes here assessed. Oklahoma is wholly without right or power to impose the taxes.

The Texas Company made mention of the Commerce clause in its amended petition (Tr. 29).

The provision of the Constitution so relied upon by Amicus Curiæ has no application here. The properties involved in the instant case are not owned by any tribe of

the allottee and not the tribe of which he is a member is the beneficial owner of the lands and any profits accruing thereto. Since the Act of March 3, 1871, 25 U.S.C.A. 71, no Indian tribe has been recognized as an independent sovereighty. The rights of citizenship have been bestowed upon Indians. The Indians here involved as citizens of the State of Oklahoma are subject to the laws of the State of Oklahoma. The change in the status of the Indians and of the Indian Tribes is discussed in Oklahoma Tax Commission v. United States. 319 U.S. 589, at Pages 602 and 603.

We not only do not have any Indian Tribe here involved we also do not have any commerce with an Indian. In Champlin Refining Co. v. Corporation Commission. 286 U.S. 210. 235, this Court held that the production of oil and gas is essentially a mining operation and is therefore, not a part of commerce even though the product obtained is intended to be and is in fact immediately shipped to such commerce.

In Hope Natural Gas Co. v. Hall. 274 U.S. 284, 288, this Court in effect held that the matter of producing gas was not commerce.

CONCLUSION

In conclusion, the petitioner respectfully submits that the judgments of the Supreme Court of the State of Oklahoma should be reversed and the petitioner should here be permitted to impose the taxes assessed.

R. F. BARRY.
Oklahoma City, Oklahoma.
Attorney for Petilioner.

JOE M. WHITAKER. of Counsel.

NOVEMBER, 1948.

APPENDIX I

CORPORATION COMMISSION OF OKLAHOMA

Cause No: 2935

Order No. 1299

IN RE

PROPOSED ORDER NO. 159 FOR THE PROMULGATION OF ADDITIONAL AND SUPPLEMENTAL RULES FOR THE CONSERVATION OF OIL AND NATURAL GAS.

ØRDER:

The Corporation Commission having held hearing and investigation pursuant to Proposed Order No. 159 and the Oil and Natural Gas Conservation Laws of the State and in accordance with the provisions thereof having made its findings of fact, and being fully advised in the premises, it is therefore considered ordered and adjudged that the following rules, regulations and requirements be and are hereby prescribed

RULE 1. Waste Prohibited. Natural gas and crude oil or petroleum shall not be produced in the State of Oklahoma in such manner and under such conditions as to constitute waste. (Sec. 1, Ch. 197. S. L. 1915: Rule 1, Order No. 937.)

RULE 2. Waste Defined. The term waste as above used in addition to its ordinary meaning, shall include (a) escape of natural gas in commercial quantities into the open air: (b) the intentional drowning with water of a gas stratum capable of producing gas in commercial quantities: (c) underground waste: (d) the permitting of any natural gas well to wastefully burn: and (e) the wasteful utilization of such gas. (Sec. 2. Ch. 197. S. L. 1915: Rule 2. Order No. 937.)

RULE 3. Gas to be Confined—Strata to be Protected. Whenever natural gas in commercial quantities or a gas bearing stratum known to contain natural gas in such quantities is encountered in any well drilled for oil or gas in this Start, such gas shall be confined to its original stratum until such time as the same can be produced and utilized without waste, and all such strata shall be adequately protected from infiltrating waters. (Sec. 3, Ch. 197, S.L. 1915; Rule 3, Order No. 937.)

RULE 4: Commercial Quantities Defined. Any gas stratum showing a well defined gas sand and producing gas in commercial quantities and any gas coming from such a stratum or sand shall be considered a commercial quantity, and such stratum or sand shall be protected the same as if it produced gas in excess of two million cubic feet per day of twenty-four hours. (Sec. 3. Ch. 197; S. L. 1915; Rule 4, Order No. 937.)

"RULE 5. Gas to be Taken Ratably: Whenever the full production from any common source of supply of natural gas in this State is in excess of the market demands, then any person, firm or corporation having the right to drill into and produce gas from any such common source of supply, may take therefrom only such portion of the natural gas that may be marketed without waste, as the natural flow of the well or wells owned or controlled by any such person. firm or corporation bears to the total natural flow of such common source of supply having due regard to the acreage drained by each well, so as to prevent any such person, firm or corporation securing any unfair proportion of the gas therefrom; provided, that the Corporation Commission may by proper order, permit the taking of a greater amount whenever it shall deem such taking reasonable or equitable. (Sec. 4. Ch. 197. S. L. 1915: Rule No. 5, Order No. 937.)

RULE 6. Common Purchaser Rule. Every person, firm or corporation, now or hereafter, engaged in the business of purchasing and selling natural gas

in this State, shall be a common purchaser thereof, and shall purchase all of the natural gas which may be offered for sale, and which may reasonably be reached by its trunk lines, or gathering lines, without discrimination in favor of one producer as against another, or in favor of any one source of supply as against another save as authorized by the Corporation Commission after due notice and hearing, but if any such person, firm or corporation shall be unable to purchase all the gas so offered, then it shall purchase natural gas from each producer ratably. (Sec. 5, Ch. 197, S. L. 1915; Rule 6, Order No. 937.)

RULE 7. Common Purchaser — Discrimination Prevented: No common purchaser shall discriminate between likes grades and pressures of natural gas, or in favor of its own production or of production in which it may be directly or indirectly interested, either in whole or in part, but for the purpose of prorating the natural gas to be marketed, such production shall be treated in like manner as that of any other producer or person, and shall be taken only in the ratable proportion such production bears to the total production available for marketing. (Sec. 5. Ch. 197, S. L. 1915; Rule 7, Order No. 937.)

RULE 8. Gas to be Metered. All gas produced from the deposits of this State when sold shall be measured by meter and the Corporation Commission shall upon notice and hearing, relieve any common purchaser from purchasing gas of an inferior quality or grade and the Commission shall from time to time make such regulations for delivery, metering and equitable purchasing and taking as conditions may necessitate. (Sec. 5, Ch. 197, S. L. 1915; Rule 8. Order No. 937.)

RULE 9. Commission Shall Regulate the Taking of Natural Gas. The Corporation Commission shall as occasion arises prescribe rules and regulations for the determination of the natural flow of any well or wells in this State, and shall regulate the taking of natural gas from any and all common sources of sup-

ply within the State so as to prevent waste, protect the interests of the public and of all those having a right to produce therefrom, and shall prevent unreasonable discrimination in favor of any one common source of supply as against another. (Sec. 4. Ch. 197. S.L. 1915: Rule 9. Order No. 937.)

RULE 10. Eminent Domain — Acceptance of Law to be Filed with Commission. Before any person, firm or corporation, shall have, possess, enjoy or exercise the right of eminent domain, right-of-way, right to locate, maintain, construct or operate pipe lines, fixtures, or equipment belonging thereto or use 1 in connection therewith, for the carrying or transportation of natural gas, whether for hire or otherwise, or shall have the right to engage in the business of purchasing, piping, or transporting natural gas, as a public service corporation, or otherwise, such person, firm or corporation shall file in the office of the Corporation Commission a proper and explicit authorized acceptance of the provisions of the law. (Sec. 9, Ch. 197, S. L. 1915; Rule 10, Order No. 937.)

RULE 11. Duties of Conservation Officers in Reference to Rule 10. All conservation agents of the Corporation Commission are directed to inquire into the matter of the performance of and compliance with the foregoing rule (No. 10), and to prevent the transportation of gas by any person, firm or corporation, found not to have complied with said rule. (Sec. 8, Ch. 197, S. L. 1915; Rule 11, Order No. 937.)

RULE 12. Approved Methods of Preventing Waste to be Used. All operators, contractors, or drillers, pipe line companies, gas distributing companies or individuals, drilling for or producing crude oil or natural gas, or piping oil or gas for any purpose, shall use every possible precaution in accordance with the most approved methods to stop and prevent waste of oil and gas, or both, in drilling and producing operations: storage, or in piping or distributing, and shall not wastefully utilize oil or gas, or allow same to leak or escape from natural reservoirs, wells, tanks, containers, or pipes. (See also Rule 28. infra:)

RULE 13. Notice of Intention to Drill Deepen or Plug. Notice shall be given to the Corporation Commission of the intention to drill deepen or plug any well or wells and of the exact location of each and every well. In case of drilling, notice should be given at least five days prior to the commencement of drilling operations.

Notice of intention to plug must be accompanied by a complete log of the well, on forms prescribed by the Corporation Commission.

Blanks for notification and reports can be obtained on application to the Corporation Commission or its conservation agents.

RULE 14. Plugging Dry and Abandoned Wells.

(a) Must be Plugged Under Supervision of Conservation Agent.

All abandoned or dry wells shall immediately be plugged under the supervision of an oil and gas conservation agent of the Corporation Commission.

(b) Manner of Plugging.

All dry or abandoned wells must be plugged by confining all oil, gas or water in the strata in which they occur by the use of mud-laden fluid, and in addition to mud-laden fluid, cement and plugs may be used.

These wells must first be thoroughly cleaned out to the bottom of the hole and before casing is removed from the hole, the hole must be filled from the bottom to the top with mud-laden fluid of maximum density and which shall weigh at least 25 per cent. more than an equal volume of water; unless the Commission directs that some other method shall be used.

(c) Notice of Intention to Plug.

Before plugging dry and abandoned wells, notice shall be given to the Corporation Commission or its conservation agent in the field, and to all available adjoining lease and property owners, and representatives of such lease and property owners, may, in addi-

tion to the oil and gas conservation agent of the Commission. be present to witness the plugging of these wells if they so desire, but plugging shall not be delayed because of failure or inability to deliver notices to adjoining lease and property owners.

RULE 15: Log and Plugging Record to the Filed With Commission. The owner of operator shall, upon completion of any well, file with the Corporation Commission a complete record or log of the same, duly signed and sworn to, upon blanks to be furnished by the Commission upon application; and upon plugging any well for any cause whatsoever, a complete record of the plugging thereof shall be made out and duly verified on blanks to be furnished by the Commission. (Rule 25, Order No. 937.)

RULE 16. Proper Anchorage to be Laid. Before any well is begun in any field where it is not known that high pressure does not exist, proper anchorage shall be laid, so that the control casing head may be used on the inner string of casing at all times, and this type of casing head shall be kept in constant use unless it is known from previous experience and operations on wells adjacent to the one being drilled that high pressure does not exist, or will not be encountered therein. (Rule 15, Order No. 937.)

Gas Shall Be Provided Before "Drilling In." In all proven or well defined gas fields, or where it can reasonably be expected that gas in commercial quantities will be encountered, adequate preparation shall be made for the conservation of gas before "drilling in" any well: and the gas sands shall not be penetrated until equipment (including mud pumps, lubricators, etc.), for "mudding in" all gas strata, or sands, shall have been provided.

Before commencing to drill a well a separate slush pit or sump hole shall be constructed by the owner, operator or contractor for the reception of all pumpings from clay or soft shale formations in order to have

the same on hand for the making of a mud-laden fluid. (Rule 14. Order No. 937.)

Note. In order to avoid freezing casing, operators are cautioned not to allow sand or lime to be mixed with clay or soft shale pumpings.

RULE 19. Wells Not to be Permitted to Produce Oil and Gas from Different Strata. No well shall be permitted to produce both oil and gas from different strata unless it be in such manner as to prevent waste of any character to either product. Therefore, if a strata should be encountered bearing gas and the owner, operator, or contractor should go deeper in search for other gas or oil bearing lands the stratum first penetrated and likewise each and every sand in turn, shall be closed separately, and if it is not wanted for immediate use, it shall be securely shut in so as to prevent waste, either open or underground. (Rule 16, Order No. 937.)

RULE 20. Strata to be Sealed Off. No well shall be drilled through or below any oil, gas or water stratum without sealing off such stratum or the contents thereof, after passing through the sand, either by the mud-laden fluid process or by casing and packers, regardless of the volume or thickness of sand. (Rule 17, Order No. 937:)

RULE 21: Mud-Laden Fluid to be Applied. No gas sand or stratum upon being penetrated shall be drilled or left open more than three days without the application of mud-laden fluid to prevent the escape of gas while further drilling in or through such sand stratum. (Sec. 3, Ch. 194. S. L. 1915: Rule 18, Order No. 937.)

RULE 22. Density of Mud Fluid Where Well Containing Water Is Drilled into Oil or Gas Producing Strata. No operator shall drill a well into an oil or gas producing sand with water from a higher formation in the hole, or with a sufficient head of water introduced into the hole to prevent gas blowing to the surface. The well shall either be allowed to blow

until the sand has been drilled in or it shall be drilled in under a head of fluid consisting of not less than 25 per cent mud; but in no case shall gas be allowed to blow for a longer period than three days. Mud fluid used for protecting oil and gas bearing sands in upper formations while oil or gas is being produced from deeper formations shall have a density of not less than 25 per cent, mud and should contain not less than 28 per cent, mud.

RULE 23. Mud-Laden Fluid to be Applied in Pulling or Redeeming Casing. No outside casing from any oil or gas well in an unexhausted oil or gas field shall be pulled without first flooding the well with mud-laden fluid behind the inside string of casing, after unseating the casing, and as casing is withdrawn, well shall be kept full to top with said mud-laden fluid and same shall be left in the hole: and said mud-laden fluid shall be so applied as to effectively seal off all fresh or salt water strata, and all oil or gas strata not being utilized. (Rule 23, Order No. 937.)

RULE 24. Mud-Laden Fluid — When to be Applied to Completed Wells. When necessary (or in any event when ordered by the Corporation Commission) to seal off any oil, gas or water sand, casing shall be seated in mud-laden fluid; and concerning wells already drilled, the operator shall, upon the order of the Corporation Commission, raise any string or strings of casing and re-set them in mud-laden fluid when it is thought advisable to do so in order to avoid existing underground waste, pollution or infiltration. (Rule 22, Order No. 937.)

RULE 25. Fresh Water to be Protected. Fresh water, whether above or below the surface, shall be protected from pollution, whether in drilling or plugging. (Rule 14, Order-No. 937.)

RULE 26. Gas to be Separated from Oil. No gas found in the upper part of a level or sand which can be separated from the oil in the lower part of the same sand or in a lower or different sand shall be allowed or used to flow oil to the surface and all gas, so far

as it is possible to do so, shall be separated from the oil and securely protected. (Rule 19, Order No. 937.)

RULE 27. Separating Device to be Installed Upon Order of Commission. Where oil and gas are found in the same stratum and it is impossible to separate the one from the other, the operator shall, upon being so ordered by the Corporation Commission, install a separating device of approved type, which shall be kept in place and use as long as necessity, therefor exists, and after being installed, such device shall not be removed nor the use thereof discontinued without the consent of the Corporation Commission. (Rule 20, Order No. 937.)

"RULE 28. Gas Wells Not to Produce from Different Sands at the Same Time Through the Same String of Casing. No gas well shall be permitted to produce gas from different levels, sands or strata at the same time through the same string of casing. (Sec. 3, Ch. 197, S.L. 1915), and when gas upon being found is not needed for immediate use, the same shall be confined in its original stratum until such time as the same can be produced and utilized without waste (Sec. 3, Ch. /197; S. L. 1915), and in confining gas to its original place, the mud-laden fluid process shall be used unless the character of the formation involved is sufficiently ascertained and understood to know that the casing and packer method with Bradenhead attachment can be safely applied and competently used. and in the use of the casing, packing and Bradenhead method, separate strings of casing shall be run to each sand and the application of the latter method in preference to the former shall not be made without notice to and consent of the Corporation Commission. (Rule 21. Order No. 937.)

RULE 29. Vacuum Pumps Not to be Installed Except Upon Application to This Commission. The future installation of vacuum pumps or other devices for the purpose of putting a vacuum on any gas or oil bearing stratum is prohibited, provided that any operator desiring to install such apparatus may, upon

notice to adjacent lease owners or operators, apply to the Commission for permission; and in the matter of vacuum pumps heretofore installed, the use of same is authorized unless specifically discontinued by order of the Commission upon notice and hearing. (Rule 22, Order No. 937.)

RULE 30. Shooting of Wells.

(a) Wells Not to be Shot into Salt Water.

"No well shall be shot as to let in salt water or other foreign substance injurious to the oil or gas sand.

- (b.) Reports to be Made to the Corporation Commission.
- Reports shall be made to the Corporation Commission on all wells shot, showing the condition of the well before and after shooting, including the size of the shot, sand or sands shot, production before and after shooting, per cent. of water in well before and after shooting.
 - "(c) Damaged Wells to be Abandoned.

In case irreparable injury is done to the well, or to the oil or gas sand or sands by shooting, the well shall immediately be abandoned and plugged as provided by Rule No. 14 herein.

RULE 31: Gauge to be Taken — Reports to Commission. All oil and gas operators shall between the 1st and 10th days of each calendar month, take a reading of the rock pressure of all wells producing natural gas, and shall forthwith report to the Corporation Commission on gauge blanks furnished by the Commission. All such oil and gas operators shall quarterly and before the 10th day of the month following the quarter after which any oil or gas well has been completed, take a gauge of the volume of rock pressure of any such well producing natural gas and shall forthwith report to the Corporation Commission on gauge blanks furnished by the Commission; provided that nothing contained in this rule shall be construed as prohibiting the blowing of gas wells pro-

ducing fluid in such quantities as might result in damage to oil or gas sands. (Amendment to Rule 31.) Promulgated January 10th. (1929).

RULE 32. Production to be Restrained to 25 Per Cent. of Potential Capacity. When the gas from any well is being used, the flow or production thereof shall be restrained to 25 per cent. of the potential capacity of the same: that is to say in any day (24 hours) the well shall not be permitted to flow or produce more than one-fourth of the potential capacity thereof, as shown by the last monthly gauge. (Rule 29, Order No. 937.)

'RULE 33. Notification of Fires and Breaks or Leaks in Lines. All drillers, operators, pipe line companies, and individuals, operating oil or gas wells or pipe lines shall immediately notify the Commission by telegraph or telephone and by letter of all fires which occur at oil and gas wells or oil tanks owned, operated or controlled by them, or on their property, and shall immediately report all tanks struck by lightning and any other fires which destroy crude oil or natural gas. and shall immediately report in the manner heretofore. described any breaks or leaks in tanks of pipe lines. from which oil or gas is escaping. In all reports of fires, breaks, or leaks in pipes, or other accidents of this nature, the location of the well, tank, or line break shall be given showing location by quarter section, township, and range.

RULE 34. Reports from Pipe Line Companies. The Commission will from time to time require oil and gas pipe line Companies to make reports to the Corporation Commission showing wells connected with their lines during any month, names of parties from whom oil and gas are purchased, the amount of production taken therefrom, the amount of oil or gas purchased therefrom; and all oil and gas pipe line companies shall, in addition to the other reports required by the rules of the Corporation Commission. Turnish to the Commission duplicates of all reports made to the State Auditor under the oil and gas gross production tax laws. The Commission will, in case of

overproduction or for any other reason which it deems urgent, require oil and gas pipe line companies to furnish daily reports of the amount of oil or gas purchased or taken from different wells or parties.

RULE 35. Prescribing Conditions Under Which Pipe Line Companies May Connect With Oil or Gas Wells. Pipe line companies shall not connect with oil or gas wells until the owners or operators thereof shall furnish a certificate from the Corporation Commission that the conservation laws of the State have been complied with; provided this rule shall not prevent the temporary connection with any well or wells in order to take care of production and prevent waste until opportunity shall have been given the owner or operator of said well to secure certificate showing compliance with the conservation laws of the State.

RULE 36. Conservation Laws and Rules of the Corporation Commission to be Complied With Before Connecting Wells With Pipe Lines. Owners or operators of oil or gas wells shall, before connecting with any oil or gas pipe line, secure from the Corporation Commission, a certificate showing compliance with the oil and gas conservation laws of the State and conservation orders of the Corporation Commission; provided that this rule shall not prevent temporary connection with pipe lines in order to take care of production until opportunity shall have been given for securing such certificate; provided, further, that the owners or operators of such wells shall in a known or proven field make application for such certificate in anticipation of production.

RULE 37. Drilling Records to be Kept at Wells. All operators, contractors, or drillers, shall keep at each well accurate records of the drilling, re-drilling, or deepening of all wells, showing all formations drilled through, casing used, and other information in connection with the drilling operation of the property and any and all of this information shall be furnished to the Commission upon request, or to any conservation agent of the Commission.

RULE 38. Conservation Agents to Have Access to All Wells and All Well Records. Conservation agents of the Commission shall have access to all wells and to all well records, and all companies, contractors or drillers shall permit any conservation agent of the Corporation Commission to come upon any lease or property operated and controlled by them, and to inspect any and all wells and the records of said well or wells, and to have access at all times to any and all wells, and any and all records of said wells.

'Provided, that information so obtained by conservation agents shall be considered official information and shall be reported only to the Corporation Commission.

RULE 39. Notice to Contractors, Drillers and Others to Observe Rules. All contractors and drillers carrying on business or doing work in the oil or gas, fields of the State, as well as leaseholders, landowners, and operators generally, shall take notice of and are hereby directed to observe and apply the foregoing rules and regulations; and all contractors, drillers, landowners and operators will be held responsible for infraction of said rules and regulations.

RULE 40. Conservation Agents to Co-operate With Oil and Gas Inspectors of the Department of the Interior. All conservation agents appointed by the Corporation Commission shall co-operate with and invite the co-operation of the oil and gas inspectors of the United States Bureau of Mines of the Department of the Interior.

RULE 41. Conservation Agents to Assist in Enforcement of Rules. All conservation agents of the Commission shall assist in the enforcement of these rules and shall immediately notify the Commission apon observance of any infraction thereof.

Additional Rules Will Be Prescribed From Time to Time

The Commission will from time to time prescribe additional rules, regulations, and requirements for the conservation of crude oil or petroleum, and natural gas.

This Order shall be in full force and effect from and after August 20, 1917.

IN WITNESS WHEREOF, we have hereunto set our hands and caused to be affixed the seal of said Commission, this the 16th day of July, 1917.

"Corporation Commission.

J. E. LOVE, Chairman.
W. D. HUMPHREY Commissioner,
CAMPBELL RUSSELL Commissioner.

(Attest):

J. H. HYDE Secretary:

AMENDMENTS TO COMMISSIONER'S ORDER

No. 1299

Adopted January 5., 1922. in Order No. 1986

(1) Amendment to Rule No. 11 of said Order

The owners of any oil and gas mining lease in this state upon which drilling operations are or may hereafter be carried on shall post a substantial sign in a conspicuous place upon each well or derrick, giving the name of the farm, section, township and range, the name of the lease owner and number of the well.

(2) Amendment to Rule No. 13 of said Order No. 1299

The Commission may at any time upon its own motion or upon complaint received from any person interested in the property to be drilled on

in adjacent property require from the owner of the lease or the person, firm, corporation or association drilling the well a bond in a sum not to exceed \$2500.00 running to the State of Oklahoma conditioned that said well upon abadonment shall be plugged in accordance with the rules and regulations of the Commission. Said bond to remain in-force and effect until the plugging is approved by the Conservation Department: provided that any person, firm, company or corporation may file with the Commission a blanket bond in a sum not to exceed \$10,000.00 with or without surety as may be required by the Commission and to be approved by the Commission covering all wells drilling or to be drilled by the principal in said bond and said bond shall be considered in full compliance with this order until such time as the penalty of said bond shall be collected for violation of the terms thereof."

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The Supreme Court of the United States,

washington, D.C.

Gentlemen:

Subject: Oklahoma Tax Commission v. Texas Company and Magnolia Petroleum Company, Nos. 40 and 41.

The respondents seek leave to file a Rejoinder Brief, and Messrs. Mason and Modoy also seek leave to file a second Amici Curiae Brief in the above referred to cases. For reasons hereinafter set forth the petitioner opposes the filing of further briefs herein.

The petitioner respectfully submits that the cases have been fully briefed. This fact is reflected by (1) the petitioners original brief, (2) an exhaustive Amici Curiae Brief by the Solicitor General, (3) an Answer Brief by the Texas Company, (4) an Answer Brief by the Magnolia Petroleum Company, (5) an Amici Curiae Brief by Messrs. McCoy and Hayes, and (6) a Reply Brief by the petitioner.

Respondents and Mesers. Mason and McCoy asserted in their motions filed herein for leave to file additional briefs that petitioner raised new matter in its Reply Brief. This assertion is contrary to the facts as reflected by the numerous briefs filed herein, which facts we will briefly summarize. In the Amici Curiae Brief heretofore filed herein by Messrs. Mason and McCoy, they asserted that an imposing of the taxes assessed by petitioner was prohibited under the commerce clause of the Constitution of the United States. In its Reply Brief petitioner pointed out that no commerce with Indian tribes was here shown. Messrs. Mason and McCoy have stated in the Second Amici Curiae Brief which they seek to file herein that petitioner in its Reply Brief contended that Congress was without power and authority to control and regulate the Indians involved in the cases under discussion. The petitioner neither expressly nor impliedly so contended. It realized than as does it now that the power of Congress to regulate and control Indians is not dependent upon the terms of the commerce clause of the Constitution, United States v. Sandoval, 231 U.S. 28 and United States v. Kagama, 118 U.S. 375.

The respondents urge that they are here entitled to file a Rejoinder Brief because the petitioner injected new matters into the cases in its Reply Brief; that the new matter so injected was (1) the fact that Oklahoma regulates the respondents as fully and completely as did the Federal Government and (2) that respondents had voluntarily paid the taxes here assessed for a period in excess of four years. At page 42 of the petitioner's original brief it stated that "The regulations herein imposed by the Federal Government are in substance the same as those imposed by Oklahoma on all producers of oil and gas. In fact, if they comply with the regulations imposed by Oklahoma, they automatically comply with the regulations imposed by the Federal Government." In its Answer Brief the Texas Company made no answer to this

argument, but at page 20 of its Answer Brief the Magnolia Petroleum Company did. On the same page it quoted what it contended was the preamble to the regulations of the Comporation Commission of Oklahoma. This preamble did not appear in the rules and regulations of the forporation Commission in effect when the taxes here assessed accrued. This is one of the reasons the petitioner set forth at length in its Reply Brish the applicable rules of the Corporation Commission. . Another reason is that the Magnolia etroleum Company referred to and discussed the rules and regulations of the United States Geological Survey, which rules were not a part of the record in the Magnolia . Petroleum Company case. In the Answer Brief the respondents argued that a certain refund provision of the gross production statutes of Oklahoma was so worded as to indicate that the legislature did not intend to levy a gross production tax on lessees producing under departmental leases. In answer to this contention petitioner pointed out in its Teply Brief that the respondents had placed a construction on the gross production statutes by voluntarily paying gross production taxes for more than four years, that such fact should be considered in evaluating their argument to the effect that the gross production statutes should be construed as not applying to them. We deny that the gross production statutes are ambiguous but if they are. the construction placed thereon by the petitioner and respondents for a period in excess of four years is here pertinent.

now seek to file that Oklahoma was wholly without authority to regulate production from the lands of restricted Indians prior to 1947. The Answer to this contention is that Oklahoma did do so and that the Federal Government through the Beological Survey apparently acquiesced. In this particular, paragraphs numbered numerically 10 and 11 of the leases involved in the Texas case indicate that the Secretary of the Interior could take into consideration State laws and regulations and that the parties to the leases agreed to be bound by any unit operation when a proved by the Secretary of the Interior. It is only natural to assume that the Secretary of the Interior approved the orders of the Corporation Commission referred to in petitioner's Reply Brief.

Sincerely yours,

R. F. Barry, Attorney for Petitioner. SUPPLY INT U.S.

Nos. 40 and 41

In the Supreme Court of the United States

October Term, 1948.

OKLAHOMA TAX COMMISSION, Petitioner,

THE TEXAS COMPANY, Respondent.

OKLAHOMA. TAX COMMISSION, Petitioner,
No. vs. 41

MAGNOLIA PETROLEUM COMPANY, Respondent.

REJOINDER BRIEF OF RESPONDENTS, AND MOTION FOR PERMISSION TO FILE SAME.

Y. A. LAND, Tulsa, Okla., B. A. AMES,

FISHER AMES,

Oklahoma City, Okla.,
Of Counsel for Respondient, The Texas Company.

B. W. GRIFFITH,
Tulsa, Okla.,
Attorney for The Texas
Company, Respondent.

WALACE HAWKINS, Dallas, Texas,

ROBERT W. RICHARDS,
Oklahoma City, Okla.,
Attorneys for Magnolia
Petroleum Company,
Respondent.

December, 1948.

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IN THE SUPREME COURT OF THE UNITED STATES. October Term, 1948.

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OKLAHOMA TAX COMMISSION, Petitioner,
No. vs. 41

MAGNOLIA PETROLEUM COMPANY, Respondent.

REJOINDER BRIEF OF RESPONDENTS.

In petitioner's reply brief in these two cases, filed subsequent to the hearing thereof, and in the closing argument on behalf of petitioner, certain new matters or contentions were injected into the cases. Respondents have been afforded no opportunity to answer these newly advanced claims, and are therefore now requesting permission to file the following rejoinder brief. Respondents believe, and therefore so state, that this will clarify the position of the parties under these new claims, and will prove of some assistance to the Court.

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That respondents are Federal instrumentalities is established both by the factual situation and by the unbroken line of decisions of this Court.

Petitioner apparently conceded in its original brief that respondents were Federal instrumentalities, saying on. page 41:

"We have proceeded so far on the theory that the appellees are federal instrumentalities where the lands of restricted Indians are involved. We have so proceeded because of the line of decisions of this Court where it has so held."

This is followed by the statement that petitioner does not contend that the decision in *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, wrought any change with respect to respondents occupying the position of Federal instrumentalities.

Now, however, petitioner appears to recognize that if respondents are Federal instrumentalities in fact, then the law is clear that a state cannot impose a tax upon their functioning as such. Accordingly, petitioner seems to have shifted its position and to place chief reliance upon a claim that respondents are not Federal instrumentalities.

Rules and Regulations of the Corporation Commission of Oklahoma, in furtherance of its conservation program to prevent waste cannot deprive respondents of their status as Féderal instrumentalities.

Petitioner now comes forward for the first time with copies of certain purported orders of the Corporation Commission of Oklahoma, dated July 16, 1917, and January 5, 1922, (long prior to the execution of all of The Texas Company's and some of Magnolia Petroleum Company's De-

partmental oil and gas leases involved in these two cases.) attached to its Reply Brief, setting out certain rules and regulations generally applicable to conserve oil and gas and to prevent waste. This forms no part of the record of these two cases, and no contention was made thereon in the court below. Now, however, petitioner seems to contend that it has a bearing upon the question of whether respondents are Federal instrumentalities.

No mention was made of these Corporation Commission orders, either in petitioner's original brief or in its opening argument, and it was only in the closing argument and in the reply brief that the claim was made that the Corporation Commission had certain rules and regulations applicable to drilling and production of oil, and that either one or both respondents had participated in certain well-spacing programs. From this it was contended that in some unexplained way this resulted in the respondents losing their status as Federal instrumentalities, and accordingly their tax immunity.

It is impossible to see how the conservation statutes of Oklahoma, and their administration by the Corporation Commission of that state could have any influence upon or play any part in the present litigation. Certainly, Oklahoma has its conservation statutes, as have other major oil-producing states. But these statutes, and the rules and regulations promulgated pursuant thereto, have never been held enforceable where in conflict with the rules and regulations of the Secretary of the Interior, in so far as applicable to Indian lands the title to which was held by the United States for restricted Indians, unless the Secretary of the Interior (or the appropriate Government representative such as the Supervisor of Geological Survey) consented to and approved same. In other words, the rules and regula-

tions of the Oklahoma Corporation Commission have not been interpreted as superseding or ousting the powers conferred by the Congress on the Secretary of the Interior and the Geological Survey:

The Oklahoma law for the conservation or oil and gas is found in Chapter 3 of Title 52, O.S. A., and is purely a police act intended to prevent waste. Such is declared to be the purpose of well-spacing and drilling units (52-87, O.S. A.) The oil and gas lessee who complies with the orders of the Corporation Commission issued to prevent waste in no sense becomes an agency or instrumentality of the state, and there is no analogy between this situation and that of a Departmental oil and gas lessee. The application of the conservation laws of the state in order to prevent waste does not mean that the lessee there is acting for and on behalf of the state. It is not the governmental function of the state to produce the oil, but only to prevent waste.

The situation in the case of the Departmental lessee is entirely different. There, the Government in the administration of the lands of its Indian wards is charged with a duty and obligation. If the lands are valuable for oil and gas purposes, then it becomes its duty to see to it that the lands are properly developed and operated. This is a governmental function, and has been so held for many years. When the Government performs that function through a lessee, the lessee then becomes a governmental instrumentality.

If the Secretary of the Interior or the Geological Survey cooperates with the state in its conservation program, and approves certain orders of the Corporation Commission where not inconsistent with governmental rules and regulations, that does not alter the essential relationship existing between the United States and its oil and gas lessee

under a restricted Indian lease. The lessee under such a lease would have no right or power to step out from under its duties and obligation as an instrumentality of the Government, even assuming that it sought to do so. As long as lessee remains the owner and operator of such a lease, and as long as the land remains restricted, the relationship is inviolable. Even the sale and assignment of the lease is ineffective until approved by the Secretary of the Interior. Nor has the state or any of its departments any right or power to disrupt that relationship. Petitioner has been unable to produce any authority to the contrary.

We believe that it is the policy of our National Government to cooperate with the several states in furtherance of their conservation programs. But the plenary powers of the Government when dealing with its Indian wards must not be overlooked. In this connection the Act of August 4, 1947, is significant. That Act dealt with members of the Five Civilized Tribes, but it shows the legislative interpretation placed by Congress upon the power of the Government, either to cooperate with, or to refuse to cooperate with the state in carrying out its oil and gas conservation program on restricted Indian lands. We quote from the Act as follows:

"Sec. 11. All restricted lands of the Five Civilized Tribes are hereby made subject to all oil and gas conservation laws of Oklahoma: Provided, That no order of the Corporation Commission affecting restricted Indian land shall be valid as to such land until submitted to and approved by the Secretary of the Interior or his duly authorized representative."

(The above section appears as Sec. 11 in Public Laws. 336, Act of August 4, 1947, at page 728 of U.S. Code Congressional Service, 80th Congress, First Session, 1947, and said section appears on page 731 of such service.)

That a State fannot encroach upon or interfere with the exercise by the Congress of its plenary powers over Indian affairs is well established.

The plenary power of Congress over Indian affairs is so firmly established by the decisions that we did not anticipate that any contention would be made in opposition thereto, particularly since no such question was raised in the petitioner's original brief. Since, however, petitioner in its reply brief now asserts that the conservation rules and regulations of the Oklahoma Corporation Commission have some effect upon the status of respondents as instrumentalities of the Government, a brief reference is in order to a few of the cases holding that the state cannot interfere with the absolute control which the Government has over the affairs of its Indian wards.

This power of Congress over Indian affairs has been recognized for many years. In *United States* v. Kagama, 118 U. S. 375, 30 L. ed. 228, it is said:

"The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

Whether such control of Congress is regarded as supplanting the former treaty-making system (U. S. v. Kagama, supra), or as stemming from the power to regulate commerce with the Indian tribes, pursuant to Art. I, Sec. 8 of the Constitution (Ex parte Webb, 225 U. S. 663, 56 L. ed. 1248), or as arising from an inherent power of Congress

historically, and by virtue of "long-continued legislative and executive usage and an unbroken current of judicial decisions" (United States v. Sandoval, 231 U. S. 28, at p. 46, 58 L. ed. 107, at p. 114), this plenary power of Congress is beyond question.

In Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, which dealt with affairs of some of the very Indian tribes as involved in the present cases (Kiowas and Apaches), the Court said:

"Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

And in Tiger v. Western Inv. Co., 221 U. S. 286, 55 L. ed. 738, this Court said:

"We must remember in considering this subject that the Congress of the United States has undertaken from the earliest history of the government to deal with the Indians as dependent people, and to legislate concerning their property with a view to their protection as such."

From the very beginning of statehood Oklahoma has recognized the plenary power of Congress over Indian affairs within its borders. In the Enabling Act, pursuant to which Oklahoma was admitted to the Union (34 Stats. at L. 267, Chap. 3335), it is provided in Section 1 of the Act:

"That nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or

other rights, by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed."

In response to this provision, Art. I, Sec. 3, of the Oklahoma Constitution provides, among other things, that:

"The people inhabiting the State do " * disclaim all right and title in and to " * all lands lying within said limits owned or held by any Indian, tribe; or nation; * * ","

The said provision of the Enabling Act was considered in Ex parte Webb, supra, it being held that the reservation of Congress to legislate respecting Indians was within its constitutional power.

That there is no effort or desire on the part of the State of Oklahoma to interfere with Congress in the exercise of its plenary powers, but that it acknowledges same as being paramount (whether to the rules and regulations of its Corporation Commission, or otherwise) is shown by the decisions of its highest court. In addition to the decisions in the instant cases and to the other cases which we have cited, see Adams v. Freeman, 50 Pac. 135.

Petitioner in the reply brief suggests that citizenship has been conferred upon the Indians, and argues that this affects the result. But this Court has held that, unless so provided, the power of Congress with respect to Indians does not cease when the Indians become citizens.

—United States v. Nice, 241 U. S. 591, 60 L. ed. 1192; Tiger v. Western Inv. Co., supra; United States v. Sandoval, supra.

Thus, nowhere do we find that any conservation rules and regulations of the Oklahoma Corporation Commission were designed to disturb or in any way could have affected the supervision and control of the Secretary of the Interior and of the United States Geological Survey over these respondents' operations, or that they had any influence upon the relationship existing between respondents and the Government.

The relationship existing under the Departmental leases.

On page 3 of the reply brief petitioner says that respondents are as fully and completely regulated under a non-departmental lease as they are under a departmental lease. We emphatically deny this statement. So far as we : know, no commercial oil and gas lease reserves to the lessor the full and complete supervision and control over the lessee's (Producer's) operations such as flows from Departmental leases and from Rules and Regulations of the Secretary of the Interior and of the Geological Survey, promulgated pursuant to provisions of the leases and to Acts of Congress. Aside from that, however, it is not what provisions might conceivably be incorporated in some hypothetical lease that determines the relative rights and obligations of these parties, but the terms and provisions of the leases themselves, the situations which have been created, and the decisions of this Court defining the relationship which resulted. Cases are not determined upon theoretical conditions which might have existed, but upon the facts disclosed by the record in each case.

The leases here involved specifically require the lessees to conform to the regulations of the Secretary of the Interior, including those relating to conservation; require them to observe many directions and regulations of the Supervisor of the Geological Survey, who may (among other detailed powers) approve well-spacing programs. (See The Texas Company's brief, pp. 13-15; Magnolia Petroleum

Company's brief, pp. 17-21.) That which still further and even more emphatically distinguishes these Departmental leases from the ordinary commercial oil and gas lease, however, and from the relationship thereby resulting is that such Departmental lessees are in fact conducting their operations for and on behalf of the Government, under its direct supervision and control, and that the Government is through such agency performing a governmental function devolving upon itself.

This Court has so emphatically and over such a long period of time held that an oil and gas lessee in the production of oil under a Departmental lease covering restricted Indian lands is an instrumentality of the Government, that this would no longer seem to be an open question. Such has been the holding as to Indian lands whether situated in Oklahoma or in other states. There can be no doubt about the correctness of that holding in principle.

The retention by the Government of the right to direct and control the details of the operations of lessee (the manner and means) shows that lessee is not an independent contractor but is an agency. This follows the familiar rule that where the contract provides for certain work to be done (even though it goes into great detail as to specifications), but where the control over the manner and means is left to the party contracting to do the work, such party is an independent contractor. But where there is reserved the right to supervise, direct and control the manner and means of doing the work, then the relationship is that of principal and agent or master and servant.

-Singer Mfg. Co. v. Rahn, 132 U. S. 518, 33 L. ed.

In 2 Amer. Juris., Agency, Sec. & it is said:

"An independent contractor may be distinguished

from an agent in that he is a person who contracts with another to do something for him, but who is not controlled or subject to the control of the other in the performance of such contract, but only as to the result. A principal; on the other hand, has the right to control the conduct of an agent with respect to matters intrusted to him. The theory which in many cases is adopted to differentiate between an agent and an independent contractor is that one is to be regarded as an agent or an independent contractor according to whether he is subject to, or free from, the control of the employer with respect to the details of the work. Accordingly, the independence of the contract is negatived if it appears that the right of control was reserved by the employer; such independence is inferable where the evidence shows that the party entitled to exercise this right was the person employed, and not the employer."

It will be remembered that the leases in question do not stop with particularizing certain things to be done by lessee, but the significant thing, and that which sharply differentiates them from ordinary commercial oil, and gas leases, is the reservation to the departments of the Government of the power to direct and control the manner and means of doing the work. Under this, the decisions of this Court are undoubtedly correct in holding that such a lessee, in the performance of duties and obligations devolving upon the Government, is a Federal instrumentality. This clearly distinguishes the situation here from those cases involving independent contractors cited by petitioner and which are discussed in our original briefs.

TI.

The permissive Acts of Congress granting to States the power to impose taxes upon the production of oil, etc., from the lands of certain Indians relate to the lessee's operations and interest as well as to the royalty.

During the closing argument in response to a question which we believe was put by Mr. Chief Justice VINSON, counsel for petitioner said, in substance, that the Acts of Congress which gave consent to the imposition of taxes upon oil, gas and other minerals produced from the lands of certain particular Indians (but not others), had no effect upon the lessee's share of the oil, but simply permitted the state to tax the Indian's interest in the oil, theretofore untaxable. In other words, his answer was that these acts applied only to the royalty oil, and that it was not necessary to consent to the taxation of the lessee's operations. The same idea is advanced on page 13 of the reply brief. This also is a new contention by petitioner, not contained in its original brief, and is entirely without support either in the language of the acts themselves or of the decisions applying them.

Typical of such permissive acts is that relating to the production of oil from lands of the Five Civilized Tribes (45 Stat. at L. 496, and quoted on page 27 of The Texas Company's brief). We again call attention to pertinent passages as follows:

"That all minerals, including oil and gas, produced * * * from restricted allotted lands of members of the Five Civilized Tribes * * * shall be subject to all state and federal taxes of every kind * * *."

The Act then authorizes the Secretary of the Interior to make payment of the taxes which may be levied against

the royalty interest from individual Indian funds held under his supervision.

Likewise, the Act of May 29, 1924, (43 Stat. at L. 244) and held by this Court to show the consent of the Congress to the imposition of the gross production tax of Montana to oil produced from Blackfeet Indian lands, provides:

"That the production of oil and gas and other minerals on such lands may be taxed by the state in which said lands are located in all respects the same as production on unrestricted lands * * *."

and then continues with an authorization to the Secretary of the Interior to pay the taxes which might be assessed against the royalty interests.

This last Act was under consideration by this Court in British-American Oil Producing Co. v. Board of Equalization, 299 U. S. 159, 81 L. ed. 95, and the question there involved was whether the Congress had given its consent to the imposition of the tax upon the production of the oil by the iessee. (See p. 161 of opinion.) And in a number of other cases decided by this Court and cited in respondents' briefs the question was whether the producer of oil, gas or other minerals was subject to the tax in the absence of Congressional consent; and in each instance the answer being in the negative.

—Choctaw, O. & G. R. Co. v. Harrison, 235 U. S. 292; I, T. I. O. Co. v. Oklahoma, 240 U. S. 522; Oklahoma, ex rel., v. Barnsdall Ref., Inc., 296 U.

S, 521; Howard v. Gypsy Oil Co., 247 U. S. 503;

Large Oil Co. v. Howard, 248 U. S. 549;

Jaybird Mining Co. v. Weir, 271 U. S. 609.

In view of the above, we heard with amazement the

claim being made that these permissive Acts of Congress had no application to the lessee's operations or to the lessee's interest in the production. We believe that in every instance it has been the effect upon the lessee's operations, which has been the chief matter of inquiry, and so do not feel that this statement on behalf of petitioner should go unchallenged.

This causes us further to observe that it is absurd to assume that the Congress passed these various permissive Acts, that the Department of the Interior interpreted and applied them, and that the courts construed and enforced them over a period of many years, all as relating both to the lessee's production and to the royalty interest, if the consent Acts in fact were not a necessary prerequisite to the power of the states to impose the taxes upon the producer's operations! Such an assumption simply does not make sense.

TIT.

Respondents Are Not Tax Escapees.

Some inquiry was made at the oral argument concerning what taxes respondent might be subject to in their respective operations upon these leases, if the gross production and proration taxes do not apply. Of course the amount of taxes paid in connection with their operations and holdings elsewhere, as large taxpayers in the State is not involved here. But the only thing that would exempt the lessee under a producing oil and gas lease from the normal advalorem tax upon all property used in and about the operations is the payment of the gross production tax on the oil and gas produced. Therefore, if respondents have, as they contend, a Constitutional immunity from the gross production tax, then they are subject to the normal advalorem tax, which can

be enforced as to back years, since there is no statute of limitations which we know of applicable thereto. Under this, respondents can be taxed upon all their pipe lines (gathering lines, water lines, etc.), rigs, pumps, separators, storage tanks, casing in the hole, etc. These things sometimes run up into high figures. In addition, the oil itself after being run and put into storage is held to be subject to ad valorem taxes.

-Taber v. I. T. I. O. Co., 300 U. S. 1.

Also, any gain resulting from the operations is subject to the state's income taxes.

-Helvering v. Mountain Producers Corp., 303 U.S.

Thus it will be seen that these respondents are by no means tax escapees. They are subject to one form of taxes, or the other. But the fact that they may be subject to the other form of taxation does not prevent their clairing a Constitutional tax immunity from the gross production tax and the proration tax, if that immunity in fact exists.

IV.

There Is No Inconsistency in Respondents' Position in Opposing the Taxes in Question.

Again the petitioner, at the very conclusion of these cases steps completely outside the record and seeks to inject contentions not theretofore advanced. In the concluding argument of petitioner it was stated that the respondents paid the gross production taxes and proration taxes on the properties involved for a period prior to August, 1942, and May, 1941, respectively, and that they were inconsistent in protesting payments involved in this litigation. In the reply brief, page 11, petitioner in referring to this says that no

contention is made that the payment of the taxes for the period involved in these two suits "is any proof that they owe the taxes for which they here seek recovery", but claims that this should be considered in connection with respondents' argument that the legislature did not intend to impose a tax on the production of the oil in question. In an apparent effort further to emphasize this, petitioner attaches a statement dated November 22, 1948, (after the hearing of these cases), to the effect that respondents had for a time paid taxes without protest covering production from their restricted leases. Petitioner did not find it convenient to refer to the subsequent consistent payment of these taxes by respondents under protest.

These statements are dehors the record; no such contention was made in the court below; and respondents have not previously had any opportunity to meet this argument. It is improperly injected into the cases and should not be considered by the Court. Apart from that, however, these taxes are payable monthly, and the protests thereof stand upon a monthly basis, each month's protested taxes giving rise to a separate cause of action (see 68-1474 and 68-1475 O. S. A., quoted in our original briefs). Thus the fact that respondents may have failed to protest certain earlier taxes did not militate against their suing for the recovery of the taxes here involved.

Summary and Conclusion.

The remaining matters in the reply brief are discussed in our answer briefs, to which we respectfully refer the Court. In conclusion let us say:

- 1. That respondents are true Federal instrumentalities, both under the factual situation and under the unbroken line of decisions of this Court.
- 2. That in the absence of congressional consent, a state cannot impose a tax burden directly upon the functioning of such an instrumentality.
- 3. That although Congress under its plenary powers in Indian affairs has given such consent as to the production of oil from the lands of certain Indians, it has not seen fit to do so as to the Indian lands involved in these two cases.
- 4. That those decisions dealing with independent contractors instead of Federal instrumentalities are not controlling in the instant cases, but are clearly distinguishable therefrom.
- 5. That a tax upon gain resulting from the operation of a Federal instrumentality (income tax) is not a tax upon the operations (functioning) of the instrumentality, but is further removed, and therefore distinguishable therefrom.
- 6. That these respondents having undertaken and assumed the duties and burdens of Federal instrumentalities, are entitled to be protected in any constitutional rights and benefits flowing from the relationship thus created.
 - 7. That where the Government is in fact performing

through its selected agency some essential governmental function (as in the administration of the affairs of its Indian wards), the doctrine of immunity from state burdens is a wholesome and necessary one, and should not lightly be cast aside. "

Respondents therefore submit that the judgment of the Supreme Court of Oklahoma in these two cases is correct and should be affirmed.

Respectfully submitted.

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Petroleum Company,

Respondent.

December, 1948.

IN THE SUPREME COURT OF THE UNITED STATES. October Term, 1948.

Nos. 40 and 41.

OKLAHOMA TAX COMMISSION, Petitioner,
No. vs. 40
THE TEXAS COMPANY, Respondent.

OKLAHOMA TAX COMMISSION, Petitioner,
No. vs. 41

MAGNOLIA PETROLEUM COMPANY, Respondent.

MOTION OF RESPONDENTS FOR PERMISSION TO FILE REJOINDER BRIEF.

Come now the respondents, The Texas Company and Magnolia Petroleum Company, and hereby show to the Court:

1. That during the closing argument of petitioner at the hearing of these two cases, and in the Reply Brief of petitioner filed since the argument, petitioner has injected certain new contentions into these cases, not thertofore presented either in the Supreme Court of Oklahoma or in the Original Brief of petitioner in this Court. That said new matter includes references to Rules and Regulations of the

Oklahoma Corporation Commission relating to oil and gas conservation, to well-spacing programs, and to former payment of gross production taxes by respondents; also questions of whether the consent Acts of Congress apply to the lessee under Departmental leases.

2. That respondents have been afforded no opportunity to answer these new contentions of petitioner, Oklahoma Tax Commission, and believe, and therefore so state, that the filing of their Rejoinder Brief herein would prove of assistance to the Court in the determination of these cases.

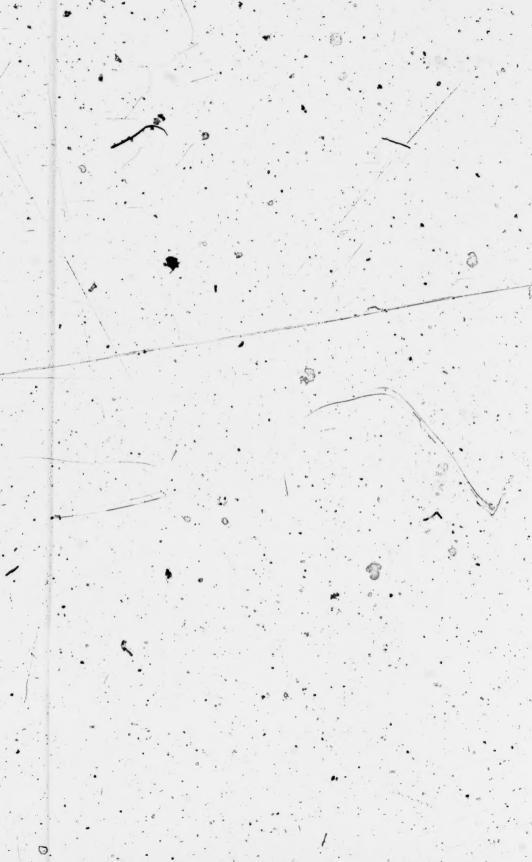
Wherefore, respondents pray the Court for permission to file their said Rejoinder Brief, tendered herewith.

B. W. GRIFFITH,
Tulsa, Okla.,
Attorney for The Texas
Company, Respondent.

Y. A. LAND,
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Robert W. Richards,
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Attorneys for Magnolia
Petroleum Company,
Respondent.

December, 1948.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 704 4

OKLAHOMA TAX COMMISSION,

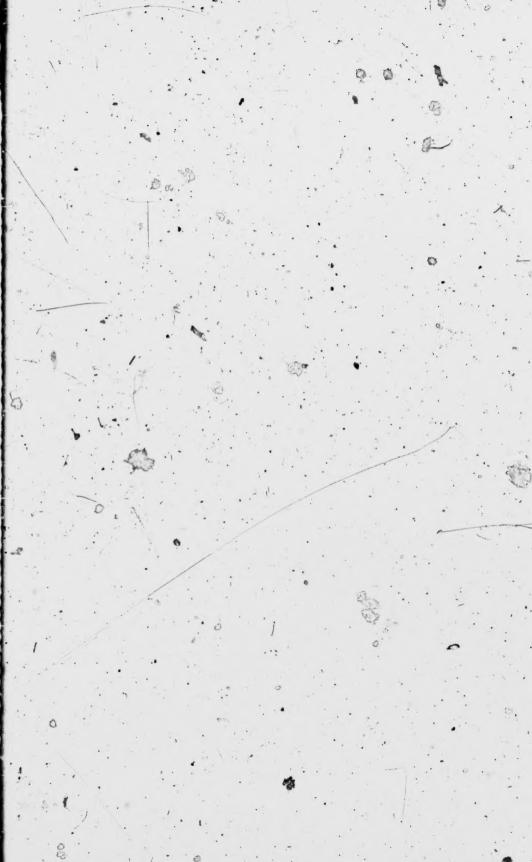
Appellant,

MAGNOLIA PETROLEUM COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATEMENT AS TO JURISDICTION

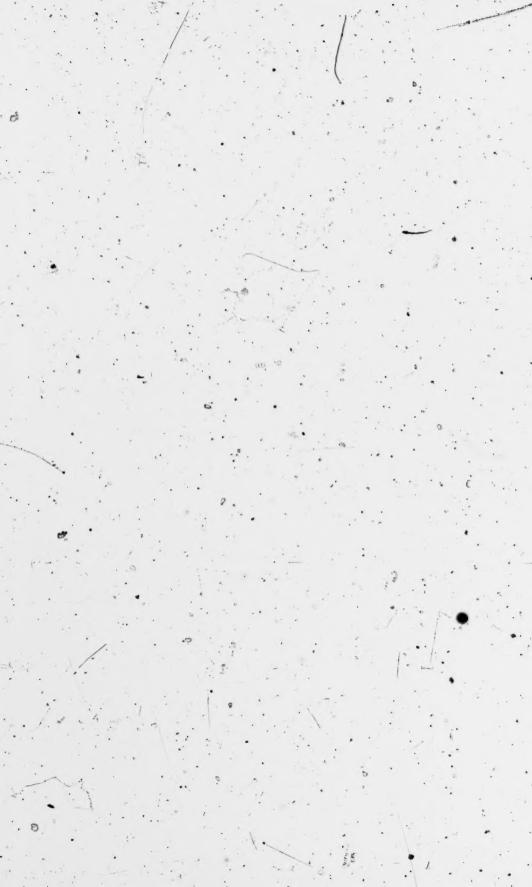
Mac Q. Williamson,
Attorney General;
Fred Hansen,
Attorney General;
R. F. Barry,
Counsel for Appellant.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 704

OKLAHOMA TAX COMMISSION,

Appellant,

vs.

MAGNOLIA PETROLEUM COMPANY,

Appellee.

STATEMENT AS TO JURISDICTION

This case originated before the Oklahoma Tax Commission where hearing was duly had and the tax assessment complained of duly made by a timely order of that Commission that under the laws of the State of Oklahoma an aggrieved taxpayer in the exercise of statutory rights, may file a suit in the District Court of Oklahoma County wherein a trial of the issues may be had; such a case was not so filed in the District Court of Oklahoma County, but the taxpayer elected to appeal directly from the order of the Oklahoma Tax Commission to the Supreme Court of Oklahoma, wherein the judgment and order of the Oklahoma Tax Commission was reversed and in which the said State Supreme Court held:

"A lessee producing oil from lands of restricted Pottawatomie, Apache, Comanche, Otoe and Missouri Indians under departmental lease approved by and subject to supervision of the Interior of the United States, is engaged in the operation of a governmental instrumentality or agency and in the absence of permissive legislation by Congress, or appropriate Federal consent or waiver or withdrawal of immunity, the oil production or the oil as produced is not subject to the state production tax of five per cent of the value of the oil produced."

That upon the rendition of said opinion, petition for rehearing was filed with the Supreme Court of the State, which said petition for rehearing was by said court overruled on the 27th day of January, 1948.

Whereupon, a motion to stay mandate pending an appeal to the Supreme Court of the United States was timely filed and on the 10th day of February, 1948, the Supreme Court of the State of Oklahoma made and entered the following order:

"In the Supreme Court of the State of Oklahoma The Clerk is Hereby Directed to Enter the Following Orders: 32,678—Magnolia Petroleum Co. v. Oklahoma Tax Commission. Ordered that mandate in the above styled causes be stayed until April 29, 1948, pending appeal to the U.S. Supreme Court, and thereafter until Final disposition by that court if appeals are perfected within time allowed."

The state Statute involved in this controversy is found in Ch. 20, Title 68, Sec. 821 et seq. O. S. 1941, as amended by Ch. 20, Sec. 827, O. S. 1947, Cumulative Supplement, and also found in 1947 S. L. Page 495 as Articles 1 and 2. The levying clause under which the said tax involved in this litigation is levied is Sec. 821 O. S. 1941, and levies a tax of 5% on the gross amount at the actual cash value of all the oil and gas produced within the State of Oklahoma, which said tax when so levied shall be in lieu of all taxes by the

State, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon producing leases for the mining of petroleum or other crude oil or. other mineral oil, or for natural gas and/or casinghead gas, upon the mineral rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil. The said Act further provides that the State Board of Equalization upon its initiative or upon motion may take testimony and if the rate of tax levied shall be found to be greater or less than the general ad ralorem rate of taxation, then the said Board may raise or lower the rate to conform to the general average of the ad valorem tax rafe throughout the State in order to effect uniformity and equality under the Constitution since the gross production tax is in lieu of and a substitute for the ad valorem property tax.

The decision of the Supreme Court in holding that said Statute was invalid as applied to oil and gas produced from restricted lands belonging to the oil company producer, in that to apply such tax, violated the rights of said oil company, the Magnolia Petroleum Company, under the Act of Congress, particularly the General Allotment Act of June 28, 1906, 34 Statute, 339, and the amendments thereto wherein the trust period of said property belonging to restricted Indians of one-half or more Indian Blood was extended finally to 1984.

The Federal statutory provision believed to sustain the jurisdiction of this court is Sec. 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U. S. C. Sec. 344 (a), 861 (a).

Some of the decisions which are believed to sustain the jurisdiction are those interpreting the said Acts of Congress

relating to Indian Restrictions in the light of the State taxing power, to-wit:

Oklahoma Tax Commission v. the United States, 319 U. S. 598;

Helvering v. Mountain Producers Corporation, 303. U. S. 379, and a State case.

Santa Rita Oil Company v. State Board of Equalization (Idaho) 116 Pac. (2), 1012, which passes squarely and identically upon all the issues herein and following the Mountain Producers' case, sustains the tax of the State of Idaho on restricted Indian properties holding that all cases heretofore standing in the way of the admissibility of such tax are overruled.

In that case it is further held:

"Nondiscriminatory operators' net proceeds and producers' license or gross production taxes on production of oil and gas under lease of trust patent Indian land do not constitute such direct and substantial interference with any function of federal government as to be invalid. Rev. Codes 1935, \$\\$2088\$\\$2096.2, 2397-2408."

The Federal Question

The Federal question involved in this lawsuit is the denial to the State of Oklahoma and the Oklahoma Tax Commission of the right to levy, assess and enforce the revenue laws enacted for the support of the State and local governments on the ground that some contravene the Indian treaties with the United States, the Allotment Act and in violation of the interpretation and construction of such treaties and Acts by the judiciary of both the State and national governments and particularly by the judgments of the United States courts, including the Supreme Court thereof, in that to deny the State of its right to tax, tends to destroy State and local government and deprives the State

of its exercise of its first sovereign power necessary for the existence, and denies to the State the equal protection of the law as among States under the Constitution of the United States. Said Federal questions were raised in the briefs filed in the Supreme Court and in the petition for rehearing and in the oral argument presented to said court.

It is, therefore, apparent that the construction and interpretation of the Acts of Congress, detrimental and prejudicial to the rights of Oklahoma and the construction and interpretation of the Constitution of the United States with reference to the Oklahoma taxing statute are directly involved and drawn into question and have been construed adversely to the rights of the State of Oklahoma and Oklahoma Tax Commission, prosecuting this case in its behalf under statutory authority to do so, as the constituted tax collecting agency for the collection and enforcement of all State tax measures.

That the judgment of the State Supreme Court constitutes a final judgment of the highest court of the state under the rules of this Court and the Act of Congress contained in the Judicial Code.

Wherefore, it is respectfully submitted that for the reasons stated, this Court has jurisdiction of the appeal.

Dated this 19th day of February, 1948.

Respectfully submitted,

Mac Q. Williamson,
Attorney General;
Fred Hansen,
Asst. Attorney General;
R. F. Barry,
Counsel for Appellants.

APPENDIX "A"

Filed: In Supreme Court of Oklahoma, Sept. 23, 1947. Andy Payne, Clerk.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 32678

MAGNOLIA PETROLEUM COMPANY, a Corporation, Plaintiff.*
in Error,

vs.

OKLAHOMA TAX COMMISSION, Defendant in Error.

Syllabus

1. A lessee producing oil from lands of restricted Potta-watomie, Apache. Comanche, Otoe and Missouri Indians under departmental lease approved by and subject to supervision of the Secretary of the Interior of the United States, is engaged in the operation of a governmental instrumentality of agency and in the absence of permissive legislation by Congress, or appropriate Federal consent or waiver or withdrawal of immunity, the oil production or the oil as produced is not subject to the State gross production tax of five per cent of the value of the oil produced.

Appeal from Oklahoma Tax Commission.

From order assessing gross production and oil excise or proration taxes on certain oil production the Magnolia Petroleum Corporation appeals.

Order Reversed

Wallace Hawkins, Dallas, Texas; Robert W. Richards, Okla. City, Okla., For Plaintiff in Error.

E. L. Mitchell, Edmund J. Armstrong, and C. W. King, of Oklahoma City, Okla., For Defendant in Error:

WELCH, J:

This appeal tests the validity of certain tax assessments, the gross production and oil excise tax, made against the Magnolia Petroleum Company for oil production under departmental leases on restricted lands or trusts title lands of Pottawatomie; Apache, Comanche, Obe and Missouri Indians.

When the Commission served notice of such assessments the Company filed its protests, the several notices and protests being consolidated for hearing. After hearing the Commission entered its order sustaining the assessments and upon appropriate statute the company appeals to this court.

The chief question, and as we not regard it, the controlling question is whether oil production under such admitted circumstances is subject to the state tax involved.

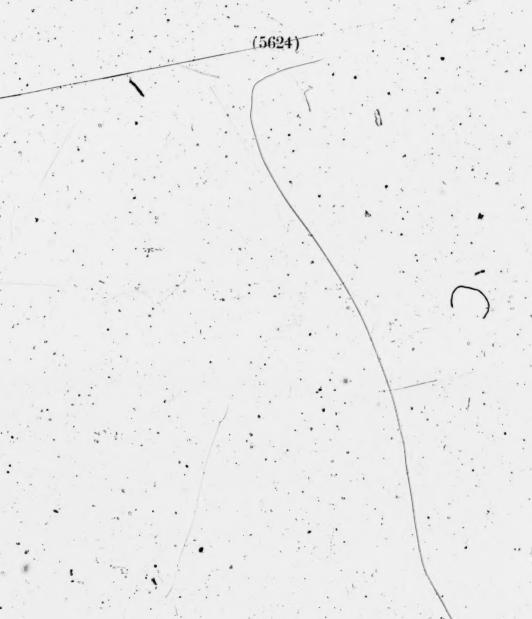
This question was determined in 32270, The Texas Company vs. Oklahoma Tax Commission, this day decided. Here also we conclude that the rule of immunity specifically upheld by the Supreme Court of the United States is binding and conclusive. See Howard v. Gypsy Oil Co., 247 U. S. 504,62 L. Ed. 1239, and Large Oil Company v. Howard, 248 U. S. 549, 63 L. Ed. 416.

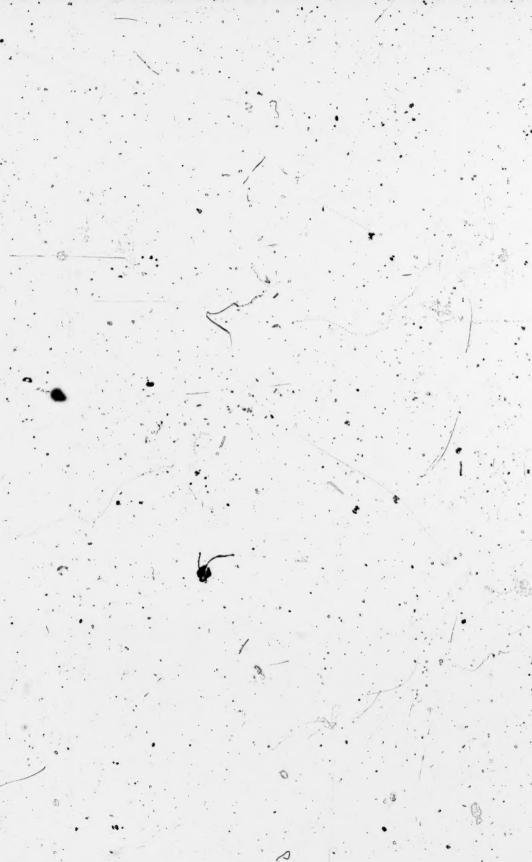
Other questions are here presented by the Company, but we deem it unnecessary to discuss or consider them in view of this determination.

By virtue of the controlling force of the authorities cited we conclude that this oil production, or oil as produced, was not subject to the tax involved. Therefore the order appealed from is reversed, with directions that the tax assessments involved be vacated.

Hurst, C.J., Davison, V.C.J., Riley, Gibson, and Luttrell, concur.

Corn, J., Dissents.





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Supreme Court of the United States

OCTOBER TERM, 1948:

OKLAHOMA TAX COMMISSION
Petitioner

VERSUS

Magnolia Petroleum Company, Respondent.

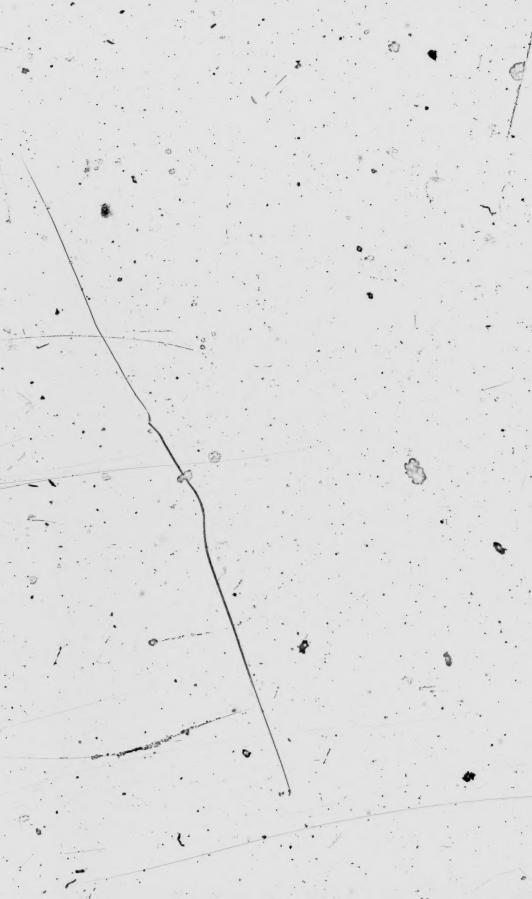
ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF OF MAGNOLIA PETROLEUM COMPANY, RESPONDENT

Walace Hawkins,
Dallas, Texas,
Robert W. Richards,
Oklahoma City, Oklahoma,

Attorneys for Magnolia Petroleum Company, Respondent.

November, 1948.



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Supreme Court of the United States October Term, 1948.

OKLAHOMA TAX COMMISSION, Petitioner,

V.ERSUS

MAGNOLIA PETROLEUM COMPANY, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF OF MAGNOLIA PETROLEUM COMPANY, RESPONDENT

OPINION BELOW

The opinion of the Oklahoma Supreme Court (R. 30-31) in the Magnolia Petroleum Company case adopts the opinion of that Court in *The Texas Company* case (No. 40). This opinion which is not officially reported is set forth in the appendix to the brief of The Texas Company. The syllabus of the State Court in each opinion is as follows, except as to the Indian tribes named:

"1. A lessee producing oil from lands of restricted Pottawatomie, Apache, Comanche, Otoe and Missouria Indians under departmental lease approved by and subject to supervision of the Secretary of the Interior of the United States, is engaged in the operation of a governmental instrumentality or agency and in the absence of permissive legislation by Congress, or appropriate Federal consent or waiver or withdrawal of immunity, the oil production or the oil as produced is not subject to the state gross production tax of five per cent of the value of the oil produced."

JURISDICTION

The jurisdiction of this Court rests upon Section 237(b) of the Judicial Code, as amended.

QUESTION PRESENTED

The primary question is whether the State of Oklahoma may, in the absence of Congressional consent, impose a gross production tax and a petroleum excise tax (proration) upon the oil and gas produced by a lessee, under a Departmental oil and gas lease, from the restricted lands of Apache, Comanche, Citizen Pottawatomie, and Otoe & Missouria Indians.

STATEMENT

In this case the Oklahoma Tax Commission made four assessments of gross production and petroleum excise taxes against Respondent, who protested same. The four assessments and protests were consolidated by agreement for hearing before the Commission. The pertinent facts with respect to procedure are set forth in Petitioner's brief (pp. 8-10).

The Respondent herein pursued one remedy provided by the State Statute (1941 Okla. Stat., Title 68, Sec. 1474; see Appendix I), while the Texas Company, Respondenting Case No. 40, pursued another and additional remedy, (1941 Okla. Stat., Title 68, Sec. 1475).

The lands involved in this case fall into three groups with respect to titles.

- 1. The full blood Indians to whom only trust patents have been issued. This includes most of the lands. It is stipulated the trust periods have been extended to include the period of time involved Lerein (R. 10).
- 2. Where, by reason of the death of the Indian allottee, undivided fractional interests are now owned by non-Indians under fee patent, and the remaining undivided interests belong to full blood restricted Indian heirs under the original trust patents. This includes the Kla-da-ing land where an undivided one-fourth (1/4) vested in the heirs of one Mary Moleno, a non-Indian, who inherited from the full blood allottee, and the Pau-Kune land where the allottee devised an undivided one-third (1/3) interest to his non-Indian widow. The remaining interest in each instance descended or was devised to full blood Indian heirs (Stip. R. 7, 8, 14, 15, 17-).
 - 3. Where the allottee conveyed her allotment, of a part thereof, by approved non-competent Indian deeds (R. 150-154), pursuant to the Act of March 1, 1907 (34 Stat. 1018, 25 USCA 405), to her son, Horton Homeratha. This, too, is restricted Indian land (Stip., R. 11-13).

The special situations with respect to the undivided one-fourth (14) interest in the Kla-da-ing, and the undi-

yided one-third (13) interest in the Pau-Kune land are incidental to the principal issue in this appeal. As stressed in the briefs of Petitioner and Amicus Curiae, the important question is whether Respondent, in producing oil from restricted Indian lands under Departmental oil and gas leases, is an instrumentality of the Federal government and immune from the State gross production and petroleum excise taxes.

SUMMARY OF ARGUMENT

- The Respondent, in producing oil from restricted Indian lands under Departmental leases approved by and subject to the supervision of the Secretary of the Interior of the United States, is a Governmental instrumentality and, in the absence of Congressional consent, the oil produced is not subject to the Oklahoma gross production tax of five per cent (5%) of the value of the oil produced. nor the petroleum excise tax of one-eighth (1/8) of one cent (1e) per barrel (See Petr. Br. Appendix I and II). The decisions of this Court recognizing this immunity have not been overruled, nor are they inconsistent with the subsequent holdings of this Court. The Congress has neverconsented to subjecting such an instrumentality to taxation, and the Oklahoma Legislature recognizes this established immunity in the very statute levying the gross production tax.

Legal title to the lands herein, except as pointed out in the Statement, supra, is in the United States. By virtue of the trust patents issued to the Indians pursuant to the

m.

General Allotment Act (Act of February 8, 1887, c. 119; 24 Stat. at L. 388, as amended), the Indians are entitled to the use and benefit thereof during the trust periods. The nature of the Indian's title in his allotted land was described as follows by this Court, in *United States* v. Rickert. 188 U. S. 432, 47 L. Ed. 532:

the legal title, giving the Indian allottee a paper or writing, improperly called a patent, showing that sometime in the future, unless extended by the President, he would be entitled to a regular patent conveying the fee. * * "."

ARGUMENT

1.

The State cannot impose a direct tax upon the functioning of an instrumentality of the Federal Government in the absence of Congressional consent.

This basic constitutional doctrine is a fundamental principle of our system of government. Since the leading case of McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, this doctrine has rarely been challenged.

In Jaybird Mining Co. v. Weir. 271 U. S. 609, 70 L. Ed. 1112, this Court said:

"It is elemental that the Federal government in all its activities is independent of State control. This rule is broadly applied. And without congressional consent no Federal agency or instrumentality can be taxed by state authority."

J See, also, Indian Motorcycle Co. v. United States, 283 U. S. 570, 75 L. Ed. 1277; Standard Oll Co. v. Johnson, 316 U. S. 481, 86 L. Ed. 1611, United States y. County of Allegheny, 322 U. S. 174, 88 L. Ed. 1209.

(a) The Respondent, as lessee of restricted Indian lands under a Departmental oil and gas lease, is a Federal instrumentality in its operations under, said lease, and the State cannot impose a gross production or petroleum excise tax upon the oil and gas produced.

The State of Oklahoma has endeavored several times to impose these taxes upon the production from restricted Indian lands. Each time this Court has held the lessee to be a Federal instrumentality carrying out the obligation of the United States to these Indians and, therefore, immune from state taxation upon its operations as such an instrumentality. Each time this Court held the gross production and petroleum excise taxes were direct taxes upon the instrumentality and undue interference by the state with the functioning of the Federal Government.

The first attempt involved a gross production tax levied upon coal produced from the land of Choctaw and Chickasaw Indians. The lessee in that case was mining coal from the tribal lands held in trust by two individual trustees "subject to the rules prescribed by the Secretary of the Interior", as the Respondent herein is producing oil, subject to the rules of the Secretary of Interior; but from lands held in trust by the United States. In this case, Choctaw O. & G. R. Co. v. Harrison (1914), 235 U. S. 292, 59 L. Ed. 234, this Court held the lessee was an instrumentality through which the United States was performing its obligation to the Indians to open and operate coal mines upon their lands and such an instrumentality was immune from the gross production tax. This Court pointed out that regardless of what the state might call the fax,

²Decisions cited and discussed; infra.,

it was in reality an occupation or privilege tax directly levied upon a Government instrumentality and invalid.

Soon thereafter the State tried a different approach in an attempt to tax leases upon restricted Indian lands. This time in evaluating the lessee's stock shares for tax purposes the State Board of Equalization considered the oil and gas leases, but this Court denied it the right to do so. Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522, 60 L. Ed. 779. In its opinion reversing the Okfahoma Supreme Court, this Court, citing Choctaw O. & G. R. Co. v. Harrison, supra, said:

"The application of the case to that at bar needs no assisting comment. A tax upon the leases is a tax upon the power to make them, could be used to destroy the power to make them. ***.

"It follows from these views that the assessment against the Oil Company, so far as it included the leases, whether as separate objects of taxation or as represented or valued by the stock company, is invalid."

Thus the state was denied the power to do indirectly that which it could not do directly. In reality that is the substance of Petitioner's argument herein; that is, even admitting Respondent is a Federal instrumentality and cannot be taxed in its functioning as such, yet if you call these taxes non-discriminatory and in lieu of ad valorem, you can leave the legal principle untarnished and also collect the tax.

In 1917-1918 the State began an attempt to subject the oil produced from restricted Indian lands to the new

gross production tax. Howard v. Gypsy Oil Co., Howard v. Indian Territory Illuminating Oil Co., Howard v. Okla. Oil Co., and Howard v. Barnsdall Oil Co., 247 U. S. 503-504. 62 L. Ed. 1239. In these four cases the lower court enjoined the State Auditor from collecting the tax. This Court affirmed the lower court's action in a single per curiam opinion citing Choctaw O. & G. R. Co. v. Harrison, supra, and Indian Territory Illuminating Oil Co. v. Oklahoma, supra.

The theory of the State, in this attempt, is not disk closed by reason of there being only a per curiam opinion, however, the case of Large Oil Co. v. Howard, 248 U. S. 549, 63 L. Ed. 416, decided by this Court in another per curiant opinion the same year as the Howard cases, supra, does reflect its contentions, if we consider the opinion of the Oklahoma Supreme Court in this latter case.3 As reflected by that opinion, the State contended that, whereas the gross production tax considered in Choctaw O. & G. R. Co. v. Harrison, supra, was not declared to be in lieu of ad valorem taxes, the new tax which it sought to enforce was in iieu. of ad valorem taxes, and, therefore, was not prohibited by this Court's decision in the former case. It was also argued that the new-gross production tax, being in lieur of ad valorem taxes, was merely a non-discriminatory tax upon the property of the lessee measured by production and not a direct tax upon the lessee's functioning as a Federal instrumentality. This is the same argument Petitioner and Amicus Curiae make in the case at bar.

In its opinion to Oklahoma Supreme Court followed this argument, holding that since the tax was only a prop-

³See Large Oil Co. v. Howard, 63 Oklas 143, 163 Pac. 537

erty tax upon the private property of the instrumentality and was not laid upon the operations of the instrumentality or upon the lease or any rights or privileges pertaining thereto, this distinguished it from Choctaw O. & G. R. Co. v. Harrison, supra, and Indian Territory Illuminating Oil Co. v. Oklahoma, supra; and added that the tax was too remote and indirect to be a burden upon the instrumentality.

This Court, in reversing the Oklahoma Supreme Court decision cited, as controlling authorities, the very decisions which had been distinguished. Thus, we must conclude this Court has already passed upon and rejected the argument which Petitioner makes in the case at bar.

There appears to have been no attempt made by the State to subject production from restricted Indian lands to the gross production tax from this decision in 1918 until subsequent to this Court's decision in Helvering v. Mountain Producers Corporation, 303 U. S. 376, 82 L. Ed. 907, in 1938. In view of this lapse of time, Petitioner's statement (Br. 19) that Oklahoma did not try to collect ad valorem taxes upon the private property of the lessee (derricks, pumps, pipe, etc.) because it believed "a gross production tax would be paid thereon" is indeed strange. It is stranger still, in view of the statement of the Oklahoma Supreme Court in 1935 in Barnsdall Refineries, Inc., et al. v. Oklahoma Tax Commission, 171 Okla. 145, 41 Pac. (2d. 918, that:

"It is now beyond question that the oil and gas feases held by the plaintiffs are governmental instru-

Discussed, infra.

⁵Aff. 296 U.S. 521, 80 L. Ed. 336. State of Okla. ex rel. Tax Comprission. Barnsdall Refineries, Inc., et al.

mentalities and that the State may not impose any tax thereon without the consent of the United States government."

The last cited case is the only one involving the petroleum excise tax in question here. Congress had authorized the collection of the gross production tax upon oil produced from Osage Indian lands (Act of March 3, 1921, 41 Stat. at L. 1249). The Tax Commission, however, undertook to also impose the petroleum excise tax of oneeighth $(\frac{1}{8})$ of one cent (1e) per barrel upon this oil. The Supreme Court of Oklahoma, in its opinion, supra, held that this was not a property tax but an excise tax bearing no relation to the value of the oil; that it was a tax upon a Federal instrumentality and not within the Congressional consent granted by the Act of March 3, 1921, supra. Upon appeal this Court affirmed the decision.6 Thus, even Petitioner's argument of non-discriminatory property tax is not available to support levying the excise tax upon the production from the restricted Indian leases herein.

(b) The Congress has not waived the tax immunity.

The Congress has not waived the constitutional immunity of the Respondent as an instrumentality of the Government in discharging its obligation to these restricted Indians. In three instances, the Congress has, by appropriate legislation, waived this tax immunity as to certain Indians. By the Act of March 3, 1921, supra, Congress authorized the State to levy and collect the gross production tax on the oil and gas produced from the Osage Indian

⁶See footnote 5, supra.

lands. The Act of May 27, 1924 (43 Stat. at L. 176), waived the immunity as to the gross production tax upon oil produced from restricted lands of the Kaw Indians. The State was granted permission to impose taxes upon the oil and gas produced from the restricted land of the Five Civilized Tribes of Indians (Cherokee, Choctaw, Chickasaw, Creek and Seminole) by the Act of May 10, 1928 (45 Stat.gat L. 496). The Act of January 27, 1933 (47 Stat. at L. 777), which imposed certain restrictions upon inherited lands of certain Indians of the Five Civilized Tribes, adopted the waiver of immunity contained in the 1928 Act, supra.

Moreover, by expressly waiving the immunity in these instances, the Congress has recognized this Constitutional immunity as an established integral part of the restricted Indian law and policy. Aside from the authorities establishing this general principle that a state cannot impose a tax upon the functioning of an instrumentality of the Federal Government, without Congressional consent, this Court has not only held Congressional consent necessary under the circumstances herein, but that any consent given will be strictly construed. In State of Oklahoma ex rel. Tax Commission v. Barnsdall Refineries, Inc., et al., supra, this Court, speaking through former Chief Justice Stone, said:

"Construing that consent with the strictness appropriate to the interpretation of a waiver of a defined tax immunity, we think the conclusion of the State Court was right."

⁷Cited in footnote 1, supra.

(c) The Legislature of Oklahoma adopted the doctring of constitutional immunity.

In 1925, which was subsequent to this Court's decision in the Howard cases and Large Oil Company case, supra, the Oklahoma Legislature passed an Act relating to the collection of the gross production tax (1925 Okla. S. L., p. 20, Ch. 20), which contained the following provision (Sec. 3):

GROSS PRODUCTION TAX—Overpayments.

"Section 3. In all cases of over-payment, duplicate payment or payment made in error on account of the production being derived from restricted Indian lands and therefore exempt from taxation, the State Auditor, by and with the approval of the State Board of Equalization, after an audit by the State Examiner and Inspector, is authorized to refund any such overpaid, duplicate or erroneous paid gross production taxes out of any gross production tax funds in his hands from the same county from which the original tax was derived and not apportioned to the State Treasurer to be distributed as provided by law."

This statute, which has never been repealed (See 68 O. S. A. 832; also, 1941 Okla. Stat., Title 68, Sec. 832), clearly declares that oil and gas produced from restricted Indian lands is exempt from the tax. The State Auditor, whose duties have been assumed by the Tax Commission, is authorized to reimburse the taxpayer for such erroneous payments. This statute is not qualified or tied in to a judicial determination of when restricted Indian lands production is exempt. It declares that it is exempt from the tax. The apparent purpose of this statute was to adopt the Constitutional immunity which this Court had declared time and.

again, and conclude the State's efforts to collect gross production taxes upon production from restricted Indian lands.

Since the Oklahoma Supreme Court held as it did in its opinion herein, it was not necessary for it to consider this statute, even though Respondent quoted the same in its brief in that Court.

(d) Doctrine of immunity not inconsistent with this Court's subsequent decisions.

It is the argument of Petitioner and the Amicus Curiae that the decisions relied upon by Respondent are so inconsistent with the subsequent decisions of this Court that the former no longer possess any authority. This argument ignores the essential difference between a tax upon the property of the instrumentality and a direct tax upon the operations or functioning of that instrumentality. This distinction has always been made by this Court in its decisions upon the dectrine, and is the reason this Court has never decised it necessary to overrule the one line of decisions in order to apply the other. The Howard cases, supra; Choctaw O. & G. R. Co. v. Harrison, supra; Indian Territory Illuminating Oil Co. v. Oklahoma Tax Commission, supra; Large Oil Co. v. Howard, supra; and Oklahoma ex rel Tax Commission v. Barnsdall Refineries, Inc., et al., supra, are typical of a tax directly upon the functioning of the instrumentality; while Union Pacific R. R. Co. v. Peniston, 18 Wall. 5, 2T L. Ed. 787; Alward v. Johnson, 282 U. S. 509, 75 L. Ed. 496; Taber v. Indian Territory Illuminating Oil Co., 300 U.S. 1, 81 L. Ed. 463; Helvering v. Mountain Producers Corp., supra; Indian Territory Illuminating Oil

Co. v. Board of Equalization, 288 U. S. 325, 77 L. Ed. 312; and James v. Drave Contracting Co., 302 U. S. 134, 82 L. Ed. 155, involved taxes on the property of the instrumentality or an indirect and remote burden. This distinction was expressed in the following words by this Court in Union Pacific R. R. Co. v. Peniston, supra (18 Wall, at p. 36):

"This distinction, so clearly drawn in the earlier decisions, between a tax on the property of a governmental agent, and a tax upon the action of such agent, or upon his right to be, has ever since been recognized. * * * "

Recognizing this fundamental distinction, there is no inconsistency between the two lines of decisions. As previously stated, the very fact that this Court has never felt compelled to overrule or question one to apply the other, recognizes the validity of Respondent's position.

Petitioner also relies upon Helvering v. Mountain Producers Corp., supra, which overruled Gillespie v. Oklahoma, 257 U. S. 501, 66 L. Ed. 338, and Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 76 L. Ed. 815. These two latter cases were considered by the Court to be unwarranted extensions of the doctrine of Federal instrumentality immunity. These cases held the net profit or gain derived by the instrumentality from its operations as such to also be immune from taxation. They extended the im-

SUnion Pac. R. R. Co. case: tax on local property of railroad; Alward V. Johnson: "Burden laid upon property employed" in connection with transportation of mail; Taber v. Indian Territory Illuminating Oil 'Co.: pump, engines, casing, etc., used in producing oil; Indian Territory Illuminating Oil Co. v. Board of Equalization: Oil in storage, 'Helvering v. Mt. Producers Corp.: Net gains derived from State School lands; James v. Drayo Contr. Co., supra: "The tax is not laid on the instrumentality. Respondent is an independent contractor." Opin. 302 U. S. at p. 149.

functioning to the profit it made from so functioning. In overruling those cases involving net gains, this Court recognized the distinction by stating in Helvering v. Mountain Producers Corp., supra, that the question presented was "whether in a case where the tax is not laid upon the leases as such, or upon the government's property or interest, but is imposed upon the gains of the lessee," there is such a direct and substantial interference as to require immunity for the lessee's income.

Petitioner also cites the Oklahoma inheritance tax cases, Oklahoma v. United States, 319 U. S. 598, 87 L. Ed. 1612, and West v. Oklahoma Tax Commission, Adv. Opin, 92 L. Ed. 1220. The inapplicability of those decisions to the case at bar is demonstrated by the Court's statement (West v. Oklahoma Tax Commission), that:

"It is the transfer of these incidents rather than the trust properties themselves, that is the subject of the inheritance tax in question."

The case of Alabama v. King & Boozer, 314 U. S. 1, & L. Ed. 3, cited by Petitioner and Amicus Curiae, is in line with the decision in James v. Dravo Contr. Co., and similar decisions, sapra. It is interesting to note that Justice McReynolds, who spoke for this Court in Choctaw O. & G. R. Co. v. Harrison, supra, dissented from the majority opinion in Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 72 L. Ed. 85% which was overruled by Alabama v. King & Boozer, supra. Justice McReynolds in his dissenting took the position that the Panhandle case extended the dock in

of immunity beyond its established scope; hence, may we not conclude Alabama v. King & Boozer merely reverted to the basic doctrine?

Wilson v. Cook, 327 U. S. 474, 90 L. Ed. 793, affirmed this Court's prior decisions that the fact the ultimate economic incidence is upon the Federal Government is not alone sufficient to invalidate the tax. This case involved an attempt by the purchaser of timber upon lands of the United States to extend the doctrine of immunity to include himself as a Federal instrumentality. The Court refused to extend the doctrine but did not question its basic soundness.

The case of Buckstaff Bath House Co. v. McKinley, 308 U. S. 358, 84 L. Ed. 322, involved interpreting a provision of the Social Security Act (49 Stat. at L. 620, Chap. 531, 42 USCA 1101) and in its opinion this Court said that it was the purpose of the section under consideration. "to exclude from this statutory system only well defined and well known classes of employers who have long enjoyed immunity from state taxation." The Respondent herein asserts an immunity which has been recognized for years. This alone distinguishes the cases.

(e) The gross production tax is levied directly upon the functioning of the lessee as an instrumentality of the Government.

Aside from the past decisions of this Court, heretofor cited and discussed, holding the above proposition to

⁹James v. Dravo Contr. Co., supra, and Alabama v. King & Bodzer, supra.

be correct and such tax, therefore, invalid, let us view it from the standpoint of its operation. The amount of the tax is measured solely by the instrumentality's production efforts. The greater the production, the greater the total tax. No tax could be more closely related to and directly upon the functioning of the instrumentality than this tax. The tax is directed squarely at the lessee's production activities and operations under the lease; which is the means employed by the Government to discharge its obligation to develop the land for oil and gas for the greatest benefit to the restricted Indians.

If the excise tax of one-eighth (1/8) of one cent (1¢), per barrel was a direct and substantial burden upon the instrumentality (State ex rel. Oklahoma Tax Commission v. Barnsdall Refineries, Inc., et al., supra), how much more is this gross production tax, formerly 3% and now 5% of the value of the production, a burden.

(f) Practical operation of the lessee as a Governmental instrumentality.

The doctrine that the Respondent, as lessee, is a governmental agency is not merely a theoretical concept of law. It is soundly based upon fact. The evidence Respondent introduced before the Oklahoma Tax Commission at the hearing was for the purpose of showing that fact. Part of that evidence, which is stipulated to be typical (R. 11, 13, 16, 18) has been included in the record herein (R. 118-150) so that this Court may be advised as to the actual working of this supervised instrumentality.

The oil and gas leases were sold to the Respondent; or its assignors, through the appropriate Indian Agency, pursuant to the "Regulations Governing The Leasing of Restricted Allotted Land for Mining Purposes, Applicable to All Allotted Lands, Except the Five Civilized Tribes and Osage Nation." Code of Fed. Reg., Title 25, Secs. 189.1 -189.33 (under the regulations then in effect, but substantially the same). The Government, through the Indian Agency, prescribed the terms of the lease, including the royalty, and accepted or rejected the purchase price bid. If the Respondent wished to acquire a lease from another purchaser at an Agency sale, the assignment was not valid until approved by the Secretary of the Interior. Having obtained the lease, the Respondent then became subject to the "Oil" and Gas Regulations Applicable, to Lands of the United States and to All Restricted and Allotted Lands (Except Osage Indian Reservation)." Code of Fed. Reg., Title 30, Sec. 221.1-221.67. For convenience the Regulations were included in the record (R. 79-117). These Regulations are not merely directory but mandatory, with penalties for failure to comply. An examination of the index to the Regulations (R. 79-82) alone reflects the fact that the Government is operating these leases through the lessees as its agents.

For instance, if the lessee believes sufficient wells have been drilled to effectively drain the land of oil and that additional wells would be uneconomic, his opinion is not conclusive. The Geological Survey Supervisor may have a different opinion, and if he believes "the interests of the lessor require additional drilling," then he may direct the lessee to proceed to drill additional wells. Rese.

Sec. 221.15 (R. 89). If the lessee fails to do so, the Geological Survey may shut down the lease pending compliance, or recommend cancellation of the lease, or have the work done at lessee's cost with 25% additional to compensate the Government-for administrative costs. Reg. Sec. 221.53 and 221.54 (a) (R. 106):

Exhibit "O-1" (R. 118) discloses that the Geological Survey instructed Respondent and other lessees how wells must be plugged and abandoned. The notice itself recognizes that this requirement goes beyond the customary practices of the industry. The notice further reflects that the change was made because the customary practice might result in difficulties if secondary recovery methods were used after primary production. In other words, it was thought that eventually the new required method would be to the greater interest of the restricted Indians, in that ultimate recovery of oil might be increased.

The Regulations require that lessee notify the Geological Survey of virtually anything it proposes to do. The notice, however, is not merely a formality, because the proposed work must be approved before the work is begun. The Exhibits referred to hereinafter show specific instances of working under the Regulations. In Exhibit P-1 (R. 119) Respondent tactfully requested prompt approval, so it could proceed immediately to deepen a well. In Exhibit P-3 (R. 121) Respondent was authorized to deepen Pau-Kune No. 6 and advised that the work would be supervised by one E. M. Pilkington of the Geological Survey authorized Respondent to abandon and plug Pau-Kune No. 4, instructing Respondent to notify it in advance

be "present and supervise and witness" the work. In Exhibit 2-6 (R. 134) Respondent had apparently obtained authority to drill deeper or to one formation, but that did not produce, so Respondent obtained permission to test another formation. This demonstrates the detailed supervision of the Government.

An examination of these Exhibits discloses that Respondent did not just get authority to abandon, or drill, or deepen a well, but rather it obtained permission to do the work in a particular manner, using named equipment and materials, including the amount of cement and the size of the pipe. The Respondent could not change its method, material or equipment without obtaining further authority. See, among others, Exhibit P-31 (R. 132).

Petitioner, implying that such regulations are of no importance here, states that compliance with the Rules of the Oklahoma Corporation Commission complies with those of the Department (Br. 42). Merely considering the purpose of the Corporation Commission as set forth in the preamble to the latter rules discloses the vital difference. The pertinent statements in that preamble are as follows:

"These rules and regulations of the Commission, and all amendments thereto, are designated and adopted for the conservation of oil and gas, and to prevent of tend to prevent waste; and are not to be interpreted as prescribing due care, or want of due care, in oil and gas leasehold operations; * * * *

On the contrary, the Departmental Regulations, supra, are for the very purpose of defining due care in the pro-

duction of oil from the restricted Indians lands. Byoits Regulations the Department of Interior prescribes and enforces methods of development and operation which it believes most beneficial to the restricted Indians.

Supreme Court herein is correct and that this Court should not reverse its prior decisions in Choctaw O. & G. R. Co. v. Harrison, supra; Indian Territory Illuminating Oil Co. v. Oklahoma, supra; Howard v. Gypsy Oil Co., supra; Howard v. Okla, Oil Co., supra; Howard v. Barnsdall Oil Co., supra; Large Oil Co. v. Howard, supra; and State of Oklahoma extrell Tax Commission v. Barnsdall Refineries, Inc., et al., or its expressions with respect to such a lessee being an instrumentality in Taber v. Indian Territory Illuminating Oil Co., supra; Indian Territory Illuminating Oil Co., supra; Indian Territory Illuminating Oil Co. v. Board of Equalization, supra; and Jaybird Mining Co. v. Weir, supra.

2.

Each lease is operated as an entirety and non-Indian ownership of a minor undivided interest did not affect lessee's status as a Federal instrumentality.

As indicated in the Statement herein, supra, an undivided one-fourth (1/4) interest in the Kla-da-ing land was inherited by or devised to Mary Moleno, a non-Indian, and the remaining three-fourth (3/4) interest went to restricted full blood Indians. The same is true with respect to the land of Pau-Kune, except one-third (1/3) vested in the non-Indian.

The oil and gas leases under which Respondent produced oil from these lands were Departmental leases, and each lease was necessarily operated as an entirety. It was impossible to do otherwise. The Department of Interior controlled and supervised the operations thereon, irrespective of the non-Indian ownership of an undivided interest. See Exhibits (R. 119-132). In order for the Government to discharge its obligation to the restricted Indians, it continued its control.

It is the contention of Respondent that it continued as an instrumentality because it could not operate the leases, segregating restricted Indians' interests from the lesser fractional interests of the non-Indians.

CONCLUSION

In view of the foregoing authorities of long standing, Respondent submits that the decision of the Supreme Court of Oklahoma is correct and should be affirmed.

Respectfully submitted,

WALACE HAWKINS,
Dallas, Texas,
ROBERT W. RICHARDS,
Oklahoma City, Oklahoma,

Attorneys for Magnolia Petroleum Company Respondent.

November, 1948.

APPENDIX

68.O. S. A. Sec. 1474.

Appeal by Aggrieved Taxpayer From Order, Ruling or Finding of Commission—Notice of Intention—Petition in Error—Record—Payment of Taxes as Condition Precedent—Refund—Bond—Scope of Section.

Any taxpayer aggrieved by any order, ruling, or finding of the Tax Commission directly affecting such taxpayer may appeal therefrom directly to the Supreme Court of Oklahoma. A taxpayer so desiring to appeal shall, within ten (10) days from the date of mailing to the taxpayer of any such order, ruling, or finding, file with the Tax Commission a written notice of his intention to appeal. Upon request of the taxpayer the Tax Commission shall furnish him an original and copy of the proceedings had in connection with the matter complained of.

Within thirty (30) days from the date of mailing to the taxpayer of the order, ruling, or finding complained of, the taxpayer desiring to appeal shall file in the office of the Clerk of the Supreme Court a petition in error specifying the grounds upon which such appeal is based. At the same time the taxpayer shall file with the Supreme Court the record of the appeal, certified to by the Secretary of the Tax Commission, and consisting of any citations, findings, judgments, motions, orders, pleadings, and rulings, together with a transcript of all evidence introduced at any hearing relative thereto, or such portion of such citations, findings, judgments, motions, orders, pleadings, rulings, and evidence as the appealing parties and the Tax Commission may agree to be sufficient to present fully to the Court the questions involved.

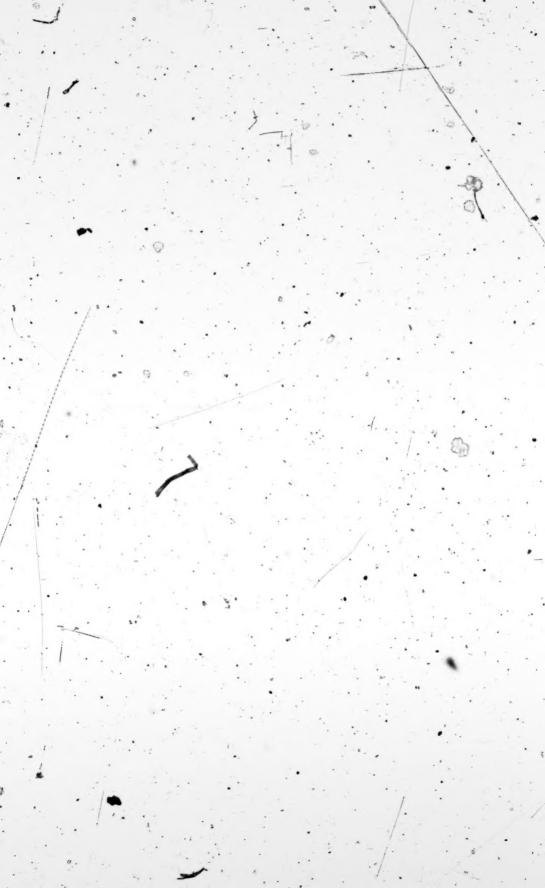
As a condition precedent to the right of the taxpayer to prosecute such an appeal, and as a jurisdictional pre-requisite of the Supreme Court to entertain such appeal.

[APPENDIX]

order, judgment, finding or ruling of the Tax Commission, assessing a tax or an additional tax, penalties, and interest, the taxpayer shall pay to the Tax Commission the amounts assessed. Any amounts so paid shall, pending the final determination of the appeal, be held by the Tax Commission in a segregated fund, and if, upon a final determination of the appeal the order assessing such tax, penalties, and interest is reversed or modified and it is determined that said tax or part thereof was erroneously assessed, said amounts so paid by the taxpayer, together with the interest thereon at the rate of three per cent (3%) per annum, shall be refunded to the taxpayer by the Tax Commission.

In lieu of the cash payment provided for in the preceding paragraph the taxpayer may file with the Tax Commission a bond in double the amount of the tax, additional tax, penalties and interest so assessed, conditioned that he will faithfully and diligently prosecute such appeal to a final determination, and in the event the order, judgment, ruling or finding of the Tax Commission be affirmed on appeal, will pay such tax, additional tax, penalties and interest, and costs so assessed against him.

If the appeal be from an order, judgment, finding or ruling of the Tax Commission other than one assessing a tax and from which a right of appeal is not otherwise specifically provided for in this Act, any aggrieved tax-payer may appeal from any such order, judgment, finding or ruling as provided in this Section, and may supersede the effect of such order, judgment, ruling, or finding by filing with the Tax Commission a bond in an amount fixed by the Tax Commission payable to the State of Oklahoma conditioned that such appeal will faithfully and diligently be prosecuted to a final determination, and





in the event the order, judgment, ruling or finding of the Tax Commission be affirmed on appeal, that such person will immediately conform thereto.

This Section shall be construed to provide a legal remedy by action at law in cases where any tax, or the method of collection or enforcement thereof, or any order, ruling, finding or judgment of the Tax Commission are complained of, or are sought to be enjoined in any action in any court of this State or the United States of America. Laws 1939, p. 381, Sec. 26.

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OMPLES ALMA ALCOHO

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1948

OKLAHOMA TAX COMMISSION, Petitioner

THE TEXAS COMPANY

ORLAHOMA TAX COMMISSION, Petitioner

. .

MAGNOLIA PETBOLEUM COMPANY

On Write of Certificant to the Supreme Coul of the Silete of Oklahoma

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 40

OKLAHOMA TAX COMMISSION, Petitioner

V.

THE TEXAS COMPANY

No. 41

OKLAHOMA TAX COMMISSION, Petitioner)

V.

Magnolia Petroleum Company

On Writs of Certiorari to the Supreme Court of the State of Okiahoma

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

In No. 40, the District Court of Oklahoma County did not file an opinion, and the opinion of the Supreme Court of Oklahoma (No. 40, R. 36-39) is not reported. In No. 41, the Oklahoma Tax Com-

mission did not file an opinion and the opinion of the Supreme Court of Oklahoma No. 41, R. 30-31) is not reported.

JURISDICTION

In both cases the judgments of the Supreme Court of Oklahoma were entered on September 23, 1947 (No. 40, R. 36-39; No. 41, R. 30-31), and petitions for rehearing were denied on January 27, 1948 (No. 40, R. 42; No. 41, R. 34). Appeals were filed in this Court on February 18 and 19, 1948, (No. 40, R. 46-49; No. 41, R. 36-38,)

On April 19, 1948, the appeals in these cases were dismissed for want of jurisdiction. Treating the papers whereon the appeals were allowed as petitions for writs of certiorari, the Court granted the petitions, the cases were consolidated for argument, and the Solicitor General was requested to file a brief as amicus curiae. (No. 40, R. 60; No. 41, R. 163). The jurisdiction of this Court rests on Section 237(b) of the Judicial Code, as amended.

QUESTIONS PRESENTED

- 1. Whether, under the Constitution of the United States, a lessee of restricted allotted Indian lands is immune from Oklahoma taxes on his gross income and on his portion of the gross production derived from such lands.
- 2. Whether, if such constitutional immunity does not exist, the laws of the United States have

created an immunity for the lessee against the imposition of these taxes.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, jufra, pp. 41-51.

STATEMENT

In No. 40, the taxpayer, the Texas Company, brought suit in the District Court for Oklahoma County against the Oklahoma Tax Commission to recover certain taxes asserted to have been illegally. collected: The taxpayer's petition (No. 40, R. 3-10) and amended petition (No. 40, R. 29-30) stated that it was the owner of oil and gas leases to certain specified properties which were restricted lands of members of the Kiowa and Apache Indian Tribes, title to which was held in trust by the United States pursuant to the General Allotment Act, as amended, and that the Indian lessons, in making the leases, were subject to the supervision and control of the United States Government. Asserting that the imposition of the Oklahoma gross production and petroleum excise taxes on the oil produced from these leases would constituté a burden and restriction on an instrumentality and agency of the Federal Government and would violate the Constitution of the United States. the petition claimed that the taxes imposed were illegal and void. The taxpayer sought recovery of

the gross production and petroleum excise taxes which it had paid with respect to its working interest in the production from these leases during the months of September, October and November, 1942. The lower court sustained a demurrer filed by the Oklahoma Tax Commission. (No. 40, R. 31.) The Supreme Court of Oklahoma reversed, with directions to overrule the demurrer. (No. 40, R. 39.)

No. 41 involved consolidated proceedings before the Oklahoma Tax Commission with respect to additional assessments proposed against the taxpayer, Magnolia Petroleum Company, for gross production and petroleum excise taxes on its interest in the production from certain specified leases for the period June 1, 1942 to March 31, 1944, together with penalties. (No. 41, R. 47-50, 54-55, 59-60, 65-67.) The stipulations of facts before the Oklahoma Tax Commissica (No. 41, R. 6-18) showed that the leases in question in which the taxpayer possessed a working interest were executed by allottees, or heirs and devisees of allottees, of members of the Citizen Pottawatomie, Apache, Comanche, and Otoe and Missouria Indian Tribes, that the allotted lands were held under land gertificates or trust deeds, that the leases were approved by the United States Department of Interior, and that, in some instances, all or part of the lessor sinterest was owned by non-Indians during the taxable periods. The Oklahoma Tax Commission ordered the proposed assessments approved

(No. 41, R. 26-28), but the Supreme Court of Oklahoma reversed the order, with directions that the assessments be vacated (No. 41, R. 31).

SUMMARY OF ARGUMENT

A. The Oklahoma gross production and petroleum excise taxes may be validly imposed or lessee of restricted alforted Indian lands so as to reach his interest in the oil and gas produced. Earlier decisions of this Court holding that taxes of this nature may not be asserted against the lessee because of an implied constitutional infinunty (Howard v. Gipsy Qil Co., 247 U. S. 503; Large On Co. v. Howard, 248 N. S. 549) are basically inconsistent with subsequent rulings, and ought to be directly overruled. It is now well established that contractors or lessees of the United States are not immune from non-discriminatory, taxes of this kind, the validity of the tax not being affected by the possible economic effects on the Federal Government. Moreover, the taxation of the lessees, here has no direct economic consequences to the Government.

The present line of decisions denying the existence of an implied constitutional immunity for Federal lessees or contractors against local taxation has not drawn any distinction between taxes measured by net income, gross income or physical production. Accordingly, when it because settled that the State could impose a tax measured by the net income of the lessees of restricted Indian lands, it similarly meant that the State could impose a non-discriminatory tax measured by their gross income or gross physical production.

The gross production tax in issue here, moreover, is imposed in lieu of other ad valorem taxes
on the property and equipment of the lessee used in
connection with his operations. Since the State
may tax the value of such property directly by an
advalorem—tax, there is no reason to deny it the
right to tax the same property interests by another
type of tax, especially since, though measured by
gross production in the first instance, the amount
of the exaction is ultimately measured by what the
advalorem taxes would have been.

Congress has not acted to establish a statutory immunity for lessees of restricted Indian lands, and none is to be implied from its legislative silence. While Congress has, on prior occasions, subjected the mineral production from certain lands to local taxation (thereby also causing the lessees to be taxed under the then prevailing constitutional doctrine), this cannot be construed as an assertion of immunity for other lessees. Differences in Congressional policy respecting the taxable status of Indian lands do not, by implication, create similar differences with respect to the private lessees. When the doctrine of implied constitutional immunity for private lessees was overturned by this Court, Congress was entitled to as-

sume that every lessee would be subject to all local, non-discriminatory taxes, unaffected by whether the royalties of their Indian lessors were or were not immune from taxation. There is no compelling reason why Congress should have acted tecreate an immunity for the lessees here, and there is no reason why any should be implied in the absence of a direct expression of Congressional policy in favor of the creation of such an immunity.

ARGUMENT

Lessees of Restricted Allotted Indian Lands Are Not Immune From the Oklahoma Gross Production and Peiroleum Excise Taxes

A. No Constitutional Immunity Exists

1. Introductory. These cases involve the validity of the Oklahoma gross production tax (68 O. S. 1941; Sections 821-846, as amended by Article 1, Section 2, Laws, 1947, p. 495 (68 O. S. 1947 Supp., Section 827)), and of the Oklahoma petroleum excise tax (68 O. S. 1941, Sections 1218l-1218q; Sess. Laws 1943, title 68, c. 26, p. 189) as applied to operators of oil and gas leases on restricted allotted lands of Indians, the leases having been approved by the Secretary of the Interior as required by law. The lands involved are restricted against alienation and, for the most part, are held in trust by the United States, pursuant to allotments under the General Allotment Act, for various members of

¹ Act of February 8, 1887, c. 119, 24 Stat. 388, as amended.

the Pottawatomie, Kiowa, Apache, Comanche Otoe and Missouri Indian tribes. In both cases the Supreme Court of Oklahoma, one Justice dissenting, held that the lessees or the leases were federal instrumentalities, and that, in the absence of permissive action by Congress or appropriate waiver of immunity, the lessees were not constitutionally subject to tax with respect to the production of oilsand the oil produced.

We believe that the court below erred in holding that the lessees possess any immunity with respect to these taxes. It is our view that the State of Oklahoma has full authority to require the lessees to pay non-discriminatory taxes measured by the value or amount of oil and gas produced—oil and gas in which the lessees, and they alone, have any interest. The lessees, absent any express Congressional action to exempt them from local exactions,

² Allotments were made under the General Allotment Act to members of the Citizen Band of Pottawatomie Indians in conformity with the agreement of March 3, 1891, 26 Stat. 1016. Allotments were made to members of the Kiowa, Comanche and Apache tribes pursuant to the agreement approved June 6, 1900, 31 Stat. 676, the land being held in trust by the United States in the same manner as provided for in the General Allotment Act. Allotments were made to the Otoe or Missouri Indians under the General Allotment Act without any special agreement. See Mills, Oklahoma Indian Land Laws (1924), Section 438. Lands allotted under the General Allotment Act were to be held in trust by the United States for a period of twenty-five years, and the trust periods here involved have been extended from time to time.

do not possess any immunity from these Oklahoma taxes merely because they are engaged in the business of producing oil and gas from restricted lands, and because they are operating under leases which have been approved by the Secretary of the Interior.

These cases do not involve any taxes levied on or measured by the royalty oil or its proceeds and, hence, do not present any question respecting the tax immunity of the Indians whose restricted lands have been leased. Accordingly, we express no views whether these taxes would be valid if imposed on or measured by the royalty oil. See Carpenter v. Shaw, 280 U. S. 363.

2. The nature of the taxes. The Oklahoma gross production tax which is involved here is equal to 5 per centum of the gross value of the production in the case of petroleum, crude oil or other mineral oil, and natural gas and casinghead gas. The tax is required to be paid by every person engaged in the production of these mineral products. The tax is also levied on the royalty interests, and is made a lien on such interests. It is provided, however, that where the royalty is claimed to be exempt from taxation by law, the facts on which the exemption is claimed are to be reported. 68 O. S. 1941, Section 821.

The statute levying the tax states that it is in lieu of all taxes by the State and its political subdivisions on any property rights with respect to the

minerals, producing leases, mineral rights or privileges, machinery and equipment used in and around any well producing oil and gas, the oil and gas during the tax year in which produced, and any investment in any of the leases, rights, privileges, minerals, or other property mentioned. The State Board of Equalization is given power to raise of lower the gross production tax where, if imposed, it is greater or less than would be the general ad valorem tax for all purposes on the property of the producer subject to taxation in the district of districts where situated. Revision of the amount of tax is subject to review by the Supreme Court of Oklahoma. 68 O. S. 1941, Section 821.

. A gross production tax on oil, gas and other minerals (the levy being in addition to any ad valorem taxes) was instituted by Oklahoma in 1908. Sess. Laws, 1908, c. 71, Article II, Section 6, p. 642. This was the statute before this Court in Choctaw & Gulf R.R. v. Harrison, 235 U. S. 292, where, as applied to a lessee of restricted Indian coal lands. it was construed to be an occupational tax and an unconstitutional burden on a federal instrumentality. This interpretation was contrary to that adopted in McAlester-Edwards Coal Co. v. Trapp, 43 Okl. 510, in which the court considered the 1910 re-enactment of the statute (Sess. Laws, 1910, c. 44, Section 6, p. 67) (where an additional provision was inserted permitted the producer to deduct the amount of royalties paid for the benefit of an Indian tribe), and in which it was held that, the tax being on the value of the product, less the royalties to Indians, the levy was a property tax which could be validly imposed on a lessee of restricted Indian lands.

The gross production tax was extensively revised in 1915 (Sess. Laws, 1915, c. 107, Article 2, Subdivision A, p. 151), and again in 1916 (Sess. Laws, 1916; e. 39, p. 102), one of the primary changes being to impose the tax in lieu of all other advalorem taxes.

³ The basic sections of the present statute are derived from these provisions. Further amendments were made by Sess. Laws, 1933, c. 103, p. 198, and by Sess. Laws, 1935, c. 66, Article 4, p. 271.

⁴ The Oklahoma Supreme Court at first expressed the view that the 1915 amendments did not alter the essential structure of the statute and, following the Choctaw & Gulf R: R. decision, ruled that the tax was not a property but an occupation tax. In re Gross Production Tax of Wolverine Oil Co., 53 Okl. 24. It, however, was quick to recede from this position. In Large Oil Co. v. Howard, 63 Okl. 143, reversed per curiam, 248 U.S. 549, it construed the tax, as amended by Sess. Laws, 1916, c. 39, p. 102, to be a tax on property, and considered that it could be validly levied on a lessee of restricted lands; the Wolverine case, supra, was distinguished because of changes made in the 1916 legislation. See also Whitehill v. Howard, 63 Okl. 176. The holding of the Wolverine case, so far as it denied that the tax was a property tax, was later specifically overruled in In re Skelton Lead de Zinc Co.'s Gross Production Tax, 1919, 81 Okl. 134, and this was reiterated in Bergin Oil & Gas Co. v. Howard, 82 Okl. 176. Following the Skelton case, the Oklahoma Supremes Court has consistently held for all purposes that the tax is a property tax which is in lieu of other ad valorem taxes.

The new tax, however, was hold unconstitutional as applied to a lessee of restricted Indian lands in the per curiam defisions in Large Oil Co. v. Howard, 248 U. S. 549, and Howard v. Gipsy Oil Co., 247 U. S. 503. The fact that, unlike the statute considered in the Choctaw & Gulf R.R. case, the gross production tax was imposed in lieu of ad valorem taxes was not commented on by this Court in those decisions. The Oklahoma Supreme Court, nevertheless, perservered for a time. In Lu re Skel-, ton Lead & Zinc Co.'s Gross Production Fax, 1919, 81 Okl. 134, the court refused to accept the Large Oil Co. and Gipsy Oil Co. decisions as studied evaluations of the changes in the statutory provisions." After Gillespie v. Oklahoma, 257 U. S. 501, 504-505, where, in holding invalid an Oklahoma net income tax on a lessee's income from restricted lands, Justice Holmes expressed the view that the Howard and Gipsy Oil cases had not been inadvertent decisions and that the statutory differences from those presented in the Choctair & Gilf R.R. case had not been of any moment, the Supreme Court of

In re Protest of Bendelari, Agent, 82 Okl. 97; In re Protest of E. S. Smelting, Refining & Mining Co., 82 Okl. 106; In re Protest of St. Louis Smelting & Refining Co., 82 Okl. 128. See also: Meriwether v. Lovett, 166 Okl. 73; American Oil & Réfining Co. v. Cornish, 173 Okl. 470; State v. Indian Royalty Co., 177 Okl. 238; Peteet v. Carmichael, 191 Okl. 593.

⁵ The same view was expressed in In re Protest of Bendelario Agent, 82 Okl. 97, and was followed in In re Protest of U. S. Smelting, Refining & Mining Co., 82 Okl. 106:

Oklahoma accepted the proposition that the gross production tax, even though in lieu of other advalorem taxes, could not be levied on the lessee. See Atchison, T. & S.F.R. Co. v. McCurdy, 86 Okl. 148.

The remaining provisions of the taxes involved may be briefly reviewed. Seventy-eight percent of the gross production tax is paid into the State Treasury, and is available for the general expenses of the state government. One-tenth of the sum is payable to the County Treasurer of the county where the oil or gas is produced, and is available For the construction and maintenance of county highways. Ten percent is also payable to the County Treasurer for distribution among the various school districts in the county. The remaining two percent is placed to the credit of the Oklahoma Tax Commission, and is available for collection and enforcement activities. 68 O. S. 1941, Section 827, as amended by Article 1, Section 2, Laws, 1947, p. 495 (68 O. S. Supp. 1947, Section 827).

The gross production tax becomes due on the first day of each calendar month with respect to production during the preceding monthly period. On oil or gas sold at the time of production, the tax is to be paid by the purchaser who, in making settlement with the producer and royalty owner, is authorized to deduct the amount of the tax paid. Where the tax is due before the oil is sold, and where the oil has been retained by the producer, he is required to pay the tax including that due on the

royalty oil not sold, and he is authorized, in settling with the royalty owner, to deduct the amount of tax paid on the royalty oil, or to deduct royalty oil equivalent in value to the amount of the tax paid. \$\left(\sigma \) 80. S. 1941, Section 833. The tax is pade a first and paramount lien against the purchaser's or producer's property, as the case may be. 68 Q. S. 1941, Section 836.

The petroleum excise tax dates from 1938 when Oklahoma adopted a proration law to prevent the waste of crude petroleum and natural gas (Sess. Laws, 1933, c. 131, p. 278) and enacted an excise tax which was to be used to defray the expenses of administering the provisions of the proration law (Sess. Laws, 1933, c. 132, p. 301). Since that time a new excise tax has been enacted at each succeeding session of the legislature.

The Oklahoma petroleum excise tax is one-eighth of a cent (one mill after July 1, 1943—See 1943, statute, footnote 6) per barrel on each and every barrel of petroleum oil produced in the State of Oklahoma. The tax is to be collected in the same manner as that provided for the gross production tax. As in the case of the gross production tax, the petroleum excise tax is paid by the purchaser.

<sup>Sess. Laws, 1935, c. 59, Article 2, p. 236; Sess. Laws, 1937,
c. 59, Article 2, p. 396; Sess. Laws, 1939, c. 59, Article 2, p. 412; Sess. Laws, 1941, Title 68, c. 26, p. 380; Sess. Laws, 1943, Title 68, c. 26, p. 189; Sess. Laws, 1945, Title 68, c. 26, p. 273; Sess. Laws, 1947, Title 68, c. 26, p. 461.</sup>

who is authorized to deduct the payment in settling with the producer and royalty owner and, where the oil is not sold but is retained by the producer, the tax is payable by him, but he is authorized to make a similar deduction when settling with the royalty owner: 68 O. S. 1941, Section 1218l. The monies collected are deposited to the credit of the "Conservation Fund" and the "Interstate Oil Compact Fund of Oklahoma," 68 O. S. 1941, Section 1218m. The excise taxes due in the present cases have since expired, but have been replaced by similar taxes. See 68 O. S. Supp. 1947, Sections 1220.1-1220.7. Unlike the gross production tax which, as previously referred to, is regarded by Oklahoma as a property tax, the petroleum excise tax is construed to be an excise tax on the production of oil. Barnsdall Refineries v. Oklahoma Tax Commission, 171 Okl. 145, affirmed, 296 U. S. 521.

3. The taxes are constitutional. The decisions below are erroneous in resting on the proposition that Indian Oil Co. v. Oklahoma, 240 U. S. 522; Large Oil Co. v. Howard, 248 U. S. 549; Howard v. Gipsy Oil Co., 247 U. S. 503; and, presumably, Choctaw & Gulf R.R. v. Harrison, 235 U.S. 292, require that a lessee be held immune from the Oklahoma gross production and petroleum excise taxes on his share of the oil and gas derived from restricted allotted India: lands. Those decisions, based as they were on a doctrine of implied constitutional immunity for agencies or instrumentali-

ties of the United States, are so thoroughly inconsistent with the subsequent course of decisions of this Court that they may no longer be regarded as possessing any authority as precedents. While these cases have not been expressly overruled, they have in effect, een rejected by the decisions which overturned the doctrinal basis on which they had rested.

The immunity from local taxation of allotted lands held in trust by the United States under the General Allotment Act did not arise from an express assertion of such immunity by Congress, but was held to exist because legal title to the lands was held in trust by the United States and because the subjection of the lands to local taxation would thwart the governmental policy of protecting the allottees during the period in which they were to prepare for the assumption of "the habits of civilized life, and ultimately the privileges of citizenship." United States v. Rickert, 188 U. S. 432, 437, 439. See also United States v. Board of Com'rs of Fremont County, Wyo., 145 F. 2d 329 (C. C. Λ. 10th), certiorari denied, 323 U. S. 804.

As previously stated (supra, p. 7), there is no issue in this case regarding the application of the taxes to the royalty oil, the taxpayers having paid or been assessed only with respect to production less the royalties. While the Oklahoma statute does not explicitly provide how the producer is to be taxed where the royalty oil is immune from taxation, it would seem that he has no liability for the taxes on the

The immunity of these lands from taxation was further extended to non-Indian lessees of the land and to their income derived from the land. See the remarks of Justice Black in Oklahoma Tax Comm'n v. United States, 319 U. S. 598, 603-604. Thus, in invalidating the original Oklahoma gross production tax as applied to a lessee of restricted Indian lands in Choctaw & Gulf R.R. v. Harrison, supra, the lessee was regarded as the "instrumentality" employed by the Federal Government, and was red to be exempt from the tax which the Court considered as being tantamount to an occupational tax. In Indian Oil Co. v. Oklahoma, 240 U. S. 522, it was the lease itself which was regarded as the federal instrumentality and immune from a direct property tax, it being reasoned that (p. 530)

royalties where they are non-taxable. See American Oil & Refining Co, v. Cornish, 173 Okl. 470, where the lease was from a municipality and it was assumed that the lessee had no responsibility for paying the gross production tax on the royalty oil, although he was held liable for the tax on his share of the oil produced. Accordingly, there is no present need to consider the taxable status of the royalty oil. See Carpenter v. Shaw, 280 U. S. 363, holding that oil royalties received from allotted lands, lands which were expressly declared by statute to be non-taxable, were not subject to the gross production tax, it being ruled that the tax was not on the severed oil but on the lessor's interest in the property. Cf. Choteau v. Burnet, 283 U. S. 691; Superintendent v. Commissioner, 295 U. S. 418, and Leahy v. State Treasurer, 297 U. S. 420, holding that such royalty income may be taxed under federal and state income tax statutes.

A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them.

The Choctaw & Gulf R.R. and Indian Oil Co. cases, supra were the only authorities relied on in the per curiam dispositions of Large Oil Co. v. Howard and Howard v. Gipsy Oil Co., supra, where the later enactments of the gross production tax were held invalid with respect to lessees of restricted lands.

The theory of an implied constitutional immunity as extended to such lessees roughly paralleled that accorded to private contractors of the Government where the rationale was also in terms of "instrumentality" and "the power to destroy." See Williams v. Talladega, 226 U. S. 404. It reached its culmination in Gillespie v. Oklahoma, 257 U. S. 501, which denied the State of Oklahoma the power to impose a net income tax on the non-Indian lessee's income derived from restricted Indian lands. The Court, there arrived at its decision by relying on the previous rulings invalidating the gross production tax and the ad valorem tax on the lease itself, stating (p. 506):

The same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases, and, stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards.

The Gillespic ease, as was true of Indian Oil Co. v. Oklahoma and Choctaw & Gulf R.R. v. Harrison, supra, was decided on the ground that the lessee or the lease was an instrumentality selected by the Federal Government to effectuate its policy toward the restricted lands of the Indians. The same doctrine was applied and the Gillespie decision was followed in Burnet v. Coronado Oil & Gas Co., 285. U. S. 393, where it was held that the federal income tax could not be applied to a lessee of oil lands of the State of Oklahoma, it being said (pp. 400-401):

To tax the income of the lessee * * * would amount to an imposition upon the lease itself.

The infirmity of the grounds on which this constitutional immunity rested had become fully apparent (See James v. Dravo Contracting Co., 302 U.S. 134, and the cases cited supra, fn. 8) when Helvering v. Mountain Producers Corp., 303 U.S. 376, again raised the question of the authority of the Federal Government to impose a net income tax on a lessee of state-owned oil lands. Upon a reexamination of the matter, it was there held that

Becisions subsequent to the Gillespie case had already made great inroads in the doctrine of implied immunity. Metcalf & Eddy v. Mitchell, 269 U. S. 514; Willcuts v. Bunn, 282 U. S. 216; Alward v. Johnson, 282 U. S. 509; Group No. 1 Oil Corp. v. Bass, 283 U. S. 279. These decisions, and others, convinced the four Justices who dissented in the Coronado case that the Gillespie decision ought to be overruled.

no constitutional barrier stood to deny Congress the power to impose the tax; after determining that Burnet v. Coronado Oil & Gas Co., supra, and Gillespie v. Oklahoma were incorrectly decided, both cases were expressly overruled.

The direct repudiation of those cases meant more than a reversal of decisions respecting the imposition of a net income tax on private lessees. It, together with the consistent course of decisions since James v. Dravo Contracting Co., 302 U. S. 134, marks the complete destruction of the principles on which these lessees were once held immune from non-discriminatory taxation on their property or income. This conclusion seems to have been shared by both the majority and dissenting opinions in Oklahoma Tax Comm'n v. United States, 319 U. S. 598, 603-604, 615.

If nothing more, the fact that the Gillespie gase had strictly followed the reasoning of the Choctaw & Gulf R.R. and Indian Oil Co. opinions, and had also strongly relied on the Gipsy Oil Co. and Large Oil Co. decisions, would be most persuasive that all those authorities fell along with Gillespie, even though it was not necessary to the decision in Mountain Producers that they be expressly overruled at that time.

The very basis of the decision in the Mountain Producers case was to deny the proposition that

Accord: Helvering v. Bankline Oil Co., 303 U. S. 362.

a non-discriminatory tax on a Government contractor or lessee imposed a barden which caused an unconstitutional interference with the Government; the opinion stated (303 U.S./at 386-387):

* * * that immunity from non-discriminatory taxation sought by a private person for his property of gains because he is engaged in opperations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effects. And where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the Government is other than indirect and remote.

The decisions which invalidated the gross production and property taxes for the reason that the taxation of the lessee would burden the tax exempt. Indian lands and hamper the policy of the Government toward its Indian wards were as clearly "out of harmony with correct principle" (303 U. S. 376, 387) as was Gillespie v. Oklahoma, supra, in applying the same erroneous concepts.

The lessees here can derive no comfort in their assertion of immunity on the ground that Mountain Producers, by overruling Gillespie, has only authorized the State to tax their net income from

operations under the leases, and that the taxes here are measured by gross income from production and by the amount of production. The difference between a tax on gross receipts and net earnings has been recognized as not being "controlling" (James v. Dravo Contracting Co., 302 U. S. at 158); for once the "burden" theory had been discarded such a distinction was no longer valid (see Helvering v. Gerhardt, 304 U. S. 405, 420-422, and Graves v. N. Y. ex rel O'Keefe, 306 U. S. 466, 480, 487). The decisions actually demonstrate that no difference is to be drawn between a tax measured by gross receipts, gross production, or net income; so long as the tax is non-discriminatory and the legal incidence is placed on the Government contractor or on his property, no constitutional immunity may be successfully asserted. James v. Dravo Contracting Co., supra, and Mason Co. v. Tax Commission, 302 U. S. 186 (state gross receipts tax on contractor with Federal Government); Atkinson v. Tax Commission, 303 U.S. 20 (state net income tax on contractor with Federal Government); Alabama v. King & Boozer, 314 U.S. 1 (state sales tax on sales tweost-plus contractor with Federal Government); Curry v. United States, 314 U. S. 14 (state "use" tax on materials used by cost-plus contractor with Federal Government); Wilson v. Cook, 327 U.S. 474 (state severance tax imposed on contractor who severed and purchased timber from United States lands). See also Powell, The Waning of Intergov-

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ernmental Tax Immunities, 58 Harv. L. Rev. 633, 640-641, 657-659 (1945).

The other, but closely related foundation of the Choctaw & Gulf. R.R., Indian Oil Co.; Gipsy Wil Co. and Large Oil Co. decisions, namely, that the lessee or lease is an "instrumentality" of the Government which enjoys a constitutional immunity from non-discriminatory taxation, is also discarded doctrine. Such is the plain teaching of the cases. Metcale & Eddy v. Mitchell, supra; James v. Dravo Contracting Co., supra; Mason Co. v. Tax Commission, supra; Atkinson v. Tax Commission, supra; Helvering v. Bankline Oil Co., supra; Helvering v. Mountain Producers Corp., supra; Buckstaff Co. N. McKinley, 398 U. S. 358; Alabama v. King & Boozer, supra; Curry v. United States, supra; Wilson v. Cook, supra. See United States v. Allegheny County, 322 U.S. 174, 186...

If there were even the slightest doubt as to what the Mountain Producers decision meant with respect to the kind of taxes involved in these cases, their validity would be authoritatively established by Wilson v. Cook, supra. There the State of Arkansas imposed a severance tax which was measured by the amount of timber severed. It was held that the taxpayer, who, under contract with the Federal Government, was engaged in cutting and purchasing timber from national forest reserves, was not immune from the tax, the Court saying *(327 U. S. at 482-483):

Our decision in James v. Dravo Contracting Co., supra, and in Alabama v. King & Boozer, supra, and the cases cited in those opinions, can leave no doubt that the Supreme Court of Arkansas correctly held that plaintiffs, who are taxed by the state on their activities in severing lumber from Government lands under contract with the Government, cannot claim the benefit of the implied constitutional immunity of the Federal Government from taxation by the state.

The taxes involved in the present cases cannot be successfully distinguished from those imposed in Wilson v. Cook, supra. The taxpayers here are engaged in taking natural resources from restricted Indians lands and the taxpayer in Wilson v. Cook, supra, was so engaged with respect to lands belonging to the United States. In both situations the tax is levied in direct proportion to the amount of the natural resources, which has been severed. The effect of the taxes on the United States here, where the beneficial ownership of the lands and the royalties is in the Indians, is even more remote than that considered in Wilson v. Cook, supra, so that the present cases are a fortiori situations for the denial of any immunity to the private lessees.

In the final analysis, the question is whether these taxpayers, who are engaged in the business of exploiting the resources from restricted lands for their own individual profit, and who enjoy the benefits of state and local government, are to be excused from contributing through the gross production tax to the costs of such government, and from paying through the petroleum excise tax their fair share of the costs of a conservation program in which they derive a direct and immediate benefit. Since the Constitution does not require that such an extraordinary, preferred status be accorded to lessees or contractors of the United States, there is even less reason to suppose that a different result is to obtain where the Government's financial interest is not directly involved. See Helvering v. Mountain Producers, supra.

It is submitted, accordingly, that Choctaw & Gulf R.R. v. Harrison, supra; Howard v. Gipsy Oil Co. supra, and Large Oil Co. v. Howard, supra, are directly contrary to the more recent decisions of this Court and should be expressly overruled.

While the foregoing considerations sufficiently demonstrate the constitutional validity of these taxes, it may be appropriate to observe that there are added reasons for sustaining the gross production tax. This tax, so far as the lessees are concerned, is in lieu of any other ad valorem taxes on their property rights and investment in the minerals, mineral rights, producing leases, and machinery and equipment used in and around any well. Also, by appropriate proceedings, the gross production tax may be raised or lowered to make it.

been if imposed on such property in the first instance. See *supra*, pp. 9-13.

The decisions in Howard v. Gipsy Oil Co., supra, and Large Oil Co. v. Howard, supra, as previously indicated, considered that it made no difference whether the gross production tax was in lieu of other ad valorem taxes, or was in addition to such taxes (as had been true of the statute in olved in the Choctaw & Gulf R.R. case). See Gillespie v. Oklahoma, 257 U. S. at 504-505. The Gipsy Oil and Large Oil cases, however, are contrary to the later decision in Alward v. Johnson, 282 U. S. 509, where a state gross receipts tax levied in lieu of ad valorem taxes was sustained, even though a portion of the taxpayer's gross receipts was derived from a contract with the Post Office Department to transport the United States mail.

The lessees here, as was true of the taxpayer in the Alward case, own property used in carrying on a business for profit. That property could be taxed through a direct property tax. Taber v. Indian Territory Co., 300 U. S. 1 (sustaining the Oklahoma ad valorem tax on the property and equipment of a lessee of restricted Indian lands); Indian Territory Oil Co. v. Board, 288 U. S. 325 (upholding the Oklahoma ad valorem tax on the lessee's share of oil produced under a lease of restricted lands); Curry v. United States, supra (holding valid a "use" tax on materials purchased by a con-

tractor to carry out a construction contract for the United States).

Since Oklahoma could undoubtedly exact from 3 these lessees their fair share of support for the cost of state and local government by means of a nondiscriminatory tax on their property used in producing the oil and gas under the leases, it seems reasonable that the same essential obligations can be required from them even though the tax, in the first instance, is measured by their share of the gross While the State of Oklahoma has production. found it more feasible to tax the property used in this industry through the means of a gross production tax, which is subject to revision in accordance with ad valorem standards, the effect on the United States or on its Indian wards is not any different than would be true if a simple ad valorem tax were employed. Alward v. Johnson, supra, established the validity of this kind of tax even before the Dravo decision and the cases following it denied any constitutional immunity to private contractors and lessees. Its authority today is beyond question.

The court below, however, believed that Indian Oil Co. v. Oklahoma, 240 U. S. 522, which had held that a lease of restricted Indian lands was an "instrumentality" of the Federal Government whose value could not be reached by a state ad valorem tax, was a binding precedent which compelled the

conclusion that the lessees here were immune from the gross production and petroleum excise taxes.10 Even if the actual decision in the Indian Oil Co. case could still be regarded as controlling with respect to the taxation of the lease itself, a proposition with which we cannot agree, it could not stand for the conclusion that the lessees are "instrumentalities" who are exempt from the taxes here involved, as must be apparent from the previous dis-Further, the gross production taxes in · cussion. these cases present no issue concerning the validity of taxing the value of the lease, for no question has been raised, through the appropriate statutory proredure, to test the amount of the gross production tax in comparison to what the ad valorem taxes would have been on the taxpayer's property exclusive of the lease.11

However, if this is deemed to be an appropriate opportunity, we believe that Indian Oil Co. v. Okla-

¹⁰ The Indian Oil Co. case was also relied on in the per curiam decisions in Howard v. Gipsy Oil Co. and in Large Oil Co. v. Howard, supra.

¹¹ Seeking to conform to the Indian Oil Co. decision, and while still attempting to uphold the gross production tax on the lessee of restricted lands, the Oklahoma Supreme Court in In re Skelton Lead & Zinc Co., 81 Okl. 134, 149, intimated that in making the comparison between the amount of the gross production tax and the ad valoremetax, it would not be proper to include the value of the lease in the property subject to tax. Since there is nothing in the Oklahoma statute compelling such a result; the express overruling of the Indian Oil Co. case would leave the question open to Oklahoma for decision, unembarrassed by an infirm precedent of this Court.

homa, supra, ought also to be overruled. Since the State can validly tax the value of physical property used by such a lessee or by a Government contractor (Taber v. Indian Territory Co., supra; Indian , Territory O'd Co. v. Board, supra; Curry v. United States, supra), and may even tax the value of an outstanding claim against the United States due on an open account (Smith v. Davis, 323 U. S. 111), no firm reason can exist why the State should not be able to impose a non-discriminatory tax with respect to the value of the lease or of the contract itself, either through a direct tax or by a gross production tax which is in lieu of other property taxes. The effect which such a non-discriminatory tax would have on the United States, where it is the immediate party in interest, or on its Indian wards, where leases to restricted lands are involved, is certainly no-more direct or burdensome than that resulting from a tax on the lessee's physical property, or on his gross income, or on the value of his claim against the United States. We believe that Indian Oil Co. v. Oklahoma, supra, was wrong inholding that the value of such a lease could not be taxed the same as other property, and should no longer be regarded as an authoritative precedent.

B. No Statutory Immunity Has Been Created

Since the lessees do not possess a constitutional immunity which, itself, would exempt them from non-discriminatory taxes measured by their gross

receipts or gross production, it remains to be considered whether Congress has cloaked them with an immunity which they would not otherwise enjoy. If it believed that this would have a beneficial effect on the affairs of its Indian wards, and if it saw fit to pursue such a policy, Congress could undoubtedly exempt these lessees against the taxes which are here in issue. See James v. Dravo Contracting Co., supra, pp. 160-161; Pittman v. Home Owners', Corp., 308 U. S. 21, 32-33; Maricopa County v. Valley Bank, 318 U.S. 357, 361; Board of Comm'rs v. Seber, 318 U. S. 705, 715-719; Oklahoma Tax Comm'n v. United States; 319 U. S. 598; Mayo v. United States, 319 U.S. 441, 446; Smith The question is v. Davis, supra, pp. 116-119. whether Congress has actually done so.

The court below, noting that in certain instances Congress had acted to withdraw immunity and to subject certain designated restricted lands to the Oklahoma gross production tax, concluded that the lessees here were not subject to tax because Congress (No. 40, R. 37)—

has acted on the theory that such immunity exists in the case of leases of this character unless waived.

We disagree with this reasoning and firmly believe that no conclusions can be drawn to the effect that Congress has acted so as to create an immunity for these private lessees. "The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication." Oklahoma Tax Commin v. United States, supra, 319 U. S. at 604.

A brief summary of the legislative action in this field will show that there is no basis for holding that Congress presently considers that any immunity is to be accorded to these oil and gas well operators. Despite the tax-exempt character of the land, there have been instances where Congress has acted to permit taxation in some respect of the mineral production and to authorize the payment of the taxes due on account of the Indians' roya'ty interests. This was done in the case of the Osages, the Kansas or Kaws. The Quapaws, and the Five

¹² Section 5 of the Act of March 3, 1921, e. 120, 41 Stat, 1249, authorized Oklahoma to levy its gross production tax on all oil and gas produced in Osage County and directed the Secretary of the Interior to pay the tax on the royalty interests out of the royalties received by the Osage Tribe. See H. Rep. No. 1377, 66th Cong., 3d Sess.; H. Rep. No. 1278, 66th Cong., 3d Sess.; S. Rep. No. 704, 66th Cong., 3d Sess.

In Oklahoma v. Barnsdall Corp., 296 U. S. 521, it was held that this statute was not a consent to the imposition of the petroleum excise tax and, following the then prevailing immunity doctrine, that the lessee was exempt from the imposition of this tax.

¹³ The Act of May 27, 1924, 20 200, 43 Stat. 176, consented to the imposition of Oklahoma taxes on the production of oil and gas from the restricted allotted lands of the Kansas or

¹⁴ Section 26 of the Act of March 3, 1921, c. 119, 41 Stat. 1225, as amended by the Act of April 17, 1937, c. 108, 50 Stat. 68, consented to the levy of the Oklahoma gross production

Civilized Tribes. Congressional action in this respect was prompted primarily by considerations arising from the favorable economic position of the particular Indians and by the desirability of their making a direct contribution through the specified taxes to the support of local government. See the legislative materials cited in footnotes 12-15, supra. The result of this Congressional action, under the then prevailing decisions, was similarly to withdraw the existing immunity of the lessees.

Congress, significantly, has never taken any positive or direct action to assert an immunity for any

Footnote 13 (Cont.)

Kaw Indians and authorized the Secretary of the Interior to pay the taxes assessed against the royalties out of the funds of the particular Indians. See H. Rep. No. 269, 68th Cong., 1st Sess.; S. Rep. No. 433, 68th Cong., 1st Sess., and the letter from the Secretary of the Interior dated February 16, 1924, set forth in the Committee Reports.

Footnote 14 (Cont.)

tax on lead and zine produced from the restricted lands of the Quapaws and directed the Secretary of the Interior to pay the taxes assessed against the royalty interests out of the funds of the individual Indian royalty owners. See H. Rep. No. 431, 75th Cong., 1st Sess.; S. Rep. No. 234, 75th Cong., 1st Sess.

15 Section 3 of the Act of May 10, 1928, c. 517, 45 Stat. 495, provided that all minerals produced from restricted allotted lands of the members of the Five Civilized Tribes should be subject to-taxation the same as minerals produced from other lands. See H. Rep. No. 1193, 70th Cong., 1st Sess.; S. Rep. No. 982, 76 Cong., 1st Sess., and the letter from the Secretary of the Interior dated March 7, 1928, set forth in the Committee Reports.

lessees of fax-exempt Indian lands. The legislative measures have been in the reverse direction, namely, to withdraw immunity from the Oklahoma gross production tax with respect to the restricted lands of certain Indian tribes. These enactments, moreover, all took place under a different climate of judicial decision, namely, when it appeared that the immunity would exist for the Indian lessors as well as for the private lessees unless Congress acted affirmatively to remove the exemption against taxation.

In this limited respect, it is true, Congress formerly acted on the assumption that the immunity of the lessee existed until waived by legislative action. This was so, however, only because such was the constitutional situation under the prevailing decisions. It does not follow, however, that Congress, ignoring the subsequent decisions of this Court, has tacitly made the same assumption during the past 10 years. Once it became clear that the cases extending constitutional immunity against taxation to private pasons were no longer to be followed, Congress was not required to take affirmative action to remove an immunity from the lessees of Indian lands when that immunity no longer existed; nor was it necessary for it to consent to the imposition of particular taxes against such lessees once the previously existing constitutional barrier was removed. Its silence during this period must be interpreted in the setting of the contemporaneous

judicial decisions. Mayo v. United States, supra, 2319 U.S. at 447-448.

We believe that Congress, by failing to make specific provision for the taxation of the lessees here, has not indicated any intention that they should be exempt from taxation on their activities. The situation is similar to the silence of Congress during. the time that the Gillespie decision stood for the existence, of the lessee's immunity against a state net income tax. The Mountain Producers case demonstrates that no significance should be attached to this, for the tax exemption there, quite properly, fell along with the constitutional doctrine, unchecked by notions of legislative intent that could only have been tabricated out of Congressional inaction. Surely, the failure of the legislature to mark its disagreement with constitutional decisions does not signify an adoption of those opinions as the policy of the law makers which will persist beyond the time that they are overruled.

Nor is the existence of a statutory exemption from taxation to be inferred from the fact that Congress has seen fit to consent to taxation of the mineral production from the lands of certain Indians but has not done so in the case of others. Differences in legislative policy respecting the taxation of the various Indian tribes do not add up to similar differences in policy towards their private lessees. The retention of whatever immunity at-

taches to the royalty interests of the lands involved in this case is not at all inconsistent with the lessees' being taxed on their income or on their share of production. The situation is parallel to that where the express retention of the tax immunity of the United States does not spell out an exemption for private persons who may have a direct association with the Government.

If the non-sequilur of the reasoning of the lower court were not otherwise apparent, it would become so by a consideration of the incongruous intentions imputed by it to Congress. Thus, it has never been intimated that the action of Congress outlined above or its silence in other respects gave any lessees a statutory immunity against ad valorem taxes on their property and equipment, or on their share of the oil. Taber v. Indian Territory Co., supra; Indian Territory Oil Co. v. Board, supra. Actually, Congress has acted on the supposition that such legislative immunity does not exist. Also,

The Act of February 14, 1931, c. 179, 46 Stat. 1108, amended the Act of May 10, 1928, supra, to provide against any double taxation and to provide that where the machinery and equipment was taxed on an ad valorem basis for the fiscal year ended June 30, 1931, the gross production tax should not be imposed prior to July 1, 1931. The legislative history recognized that even when the land itself was tax-exempt because of the restrictions, the lessees were liable for an advalorem tax on their property. H. Rep. No. 2327, 71st Cong., 3d Sess., and S. Rep. No. 1399, 71st Cong., 3d Sess., containing a letter from the Commissioner on Indian Affairs dated January 15, 1931.

the history of Congressional action and inaction was not considered to be an assertion of immunity for lessees against a state or federal net income tax. Helvering v. Mountain Producers Corp., supra. It would be surprising, accordingly, if Congress should have had no objection to the imposition of an ad valorem tax but should have objected to the collection of the identical amounts from the lessee when accomplished by a gross production tax which is used in the place of the more cumbersome ad valorem levy. It would also be strange if Congress believed it proper that the lessee should pay a net income tax but not a tax measured by gross income or gross production.

Actually, when Mountain Producers had settled the conclusion that such lessees stand in no more favored position to invoke a constitutional immunity against a net income tax than any other private Government contractor, Congress was certainly entitled to believe that these lessees would be required to pay the same kind of non-discriminatory local taxes as other contractors are required to bear. The failure of Congress, either before or after the Mountain Producers decision, to assert a tax exempt status for the lessees of restricted Indian lands, undoubtedly indicates an intent to permit them to be taxed by the local authorities to the limit of constitutional power.

Once the constitutional doctrine was resolved against the existence of the immunity, there was no

plausible reason for creating an implied legislative Except as it may be reflected in an increased income to the Indians, Congress would have no discernible purpose in exempting the lessees from the taxes which are under consideration. However, whether such an exemption would result in an increased return to the Indian wards is only theo-The observations in the Mountain Producers case, supra, pp. 386-387, that a tax on the lessee's net income has only a remote or indirect effect on the Government is supported by the fact that the leases approved by the Department of Interior provided for the same rental and royalty payments both before and after the overruling of Gillespie v. Oklahoma, supra.17 Further, the royalty and rental payments provided for by the Department of Interior in the case of leases of lands allotted under

Because differences in the value of different tracts of land would be feflected in the bonus which the lessor is willing to pay, an exact comparison is impossible. The fact that the royalties have remained the same does, however, tend to show that the lessors have not been significantly affected by the Mountain Producers decision.

Allotted Indian Lands for Mining Purposes, approved October 8, 1937, (25 C. F. R., Sections 189.1-189.33) (issued prior to the Mountain Producers decision but still in effect), leases are offered to the bidder offering the nighest bonus, in addition to the stipulated rentals and royalties which are a rental of \$1.25 per acre per year and royalties of 12½ percent, the rental to be credited on the royalties due. The same royalties (without a minimum rental) were provided for in the predecessor regulations approved July 7, 1925.

the General Allotment Act are exactly the same as those in the case of lands of members of the Five Civilized Pribes, where the lessees the been subject to the gross production tax since 1928. It seems a safe conclusion that the lessee's tax status has little, if any, effect on the Indian royalty owners. At least, if the taxation of the lessee is deemed to have an adverse effect on the governmental policy toward the Indian lessors, it is a matter which should call for a positive indication by Congress. 19

The rejection of the "economic burden" argument as a ground for implying a constitutional tax immunity is equally persuasive for rejecting the contention that Congress has created one by inference. Oklahoma Tax Comm'n v. United States, supra, 319 U. S. at 604. The statement in Graves v. N. Y. ex rel: O'Kecfe, supra, 306 U. S. at 480, is similarly apt here—

if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any

¹⁵ See Regulations Governing the Leasing of Restricted Lands of Members of Five Civilized Tribes, Oklahoma, for Mining, approved April 27, 1938 (25 °C. F. R., Sections 183.1-183.49).

¹⁹ Since the lessees, as previously indicated, are liable for ad valorem taxes, it is difficult to see why the gross production tax, when levied in lieu of such taxes, would have such an effect on the royalty owners as to impel Congress to invoke an immunity for the lessees against this tax, but not against the ad valorem tax.

purpose on the part of Congress to create an immunity.

In the absence of a clear expression of a legislative purpose to immunize a private lessee or contractor from non-discriminatory local taxation, doubtful indications of Congressional intent ought to be interpreted against the existence of such immunity. Smith v. Davis, supra, 323 U. S. at 117; Oktahoma . Tax Commin v. United States, supra; Buckstaff Co. v. McKinley, 308 U. S. 358; Graves v. N. Y. c.c. rel. O'Keefe, supra, 306 U. S. at 479-480. where Congress has never expressed a purpose to place the private lessee in a tax immune status, the *conclusion is clear. A cautious approach in interpreting the silence of Congress will not only avoid the casting of an unnecessary burden on it to disavow an immunity which it does not desire, but will also prevent an unwarranted temporary interference with the taxing authority of the State.20

²⁹ Where the immunity of the United States itself or of its property is asserted, the silence of Congress must be given an opposite meaning for it is not incumbent on Congress to make an express declaration of the immunity. See United States v. Allegheny County, 322 U.S. 174, 177, 189; Mayo v. United States, 319 U.S. 441, 447-448. Whether Congressional silence, where the taxable status of the property of Indians is in question, should be weighed for or against the existence of the immunity (compare Oklahoma Tax Comm'n v. United States, supra, and Superintendent v. Commissioner, supra, with Carpenter v. Shaw, supra, and United States v. Rickert, supra) need not be resolved here, for the tax immunity of a

These matters plainly indicate the conclusion that no tax immunity exists for the taxpayers in these cases.

CONCLUSION

In view of the foregoing, the decisions below, should be reversed and the validity of the imposition of the taxes should be sustained.

Respectfully submitted,

PHILIP B. PERLMAN, Solicitor General.

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August, 1948

private lessee or contractor stands on an altogether different basis and no sound reason can be suggested for a "liberal" interpretation in favor of its existence.

APPENDIX

68 Oklahoma Statutes (1941):

§ 821. Gross production tax on minerals, oil and gas-Powers of Tax Commission-Tax in lieu of other taxes-Equalization - Every person, firm, association or corporation engaged in the mining or production, within this State, of the aforesaid asphalt, or of ores bearing lead, zinc, jack, gold, silver, or copper, or of petroleum or other crude oil or other mineral oil, natural gas and/or casinghead gas, shall, monthly, file with the Oklahoma Tax. Commission, a statement under oath, on forms prescribed by it, showing the location of each mine or oil or gas well operated or controlled by such person, firm, corporation or association during the last. preceding monthly period; the kind of such mineval, oil or gas produced; the gross amount thereof. produced; and the actual cash value thereof at the time and place of production, including any and all premiums received from the sale thereof; the amount of royalty payable thereon; and, where such rovalty is claimed to be exempt from taxation by law, the facts on which such claim of exemption ; is based, and such other information pertaining thereto as the Oklahoma Tax Commission may require, and shall at the same time pay to the Oklahoma Tax Commission, a tax equal to three-fourths of one per centum on the gross value of asphalt, ores bearing lead, zine, jack, gold, silver and copper

produced which is hereby levied and a tax equal to five per centum of the gross value of the production of petroleum or other crude or mineral oil which is hereby levied based on 42/U. S. gallons of 231 cubic inches per gallon, computed at a temperature of 60 degrees Fahrenheit for oil measurements and a tax equal to five per centum of the gross value of the production of natural gas and/or casinghead gas, which is hereby levied. Provided, however, that none of the provisions of this Act shall be construed to affect or impar the liability imposed upon the purchaser of petroleum crude oil or other mineraloil, natural gas and/or casinghead gas, by any law or laws of the State of Oklahoma relating to the payment of gross production taxes by the purchasers of such petroleum crude eil or other mineral oil, natural gas and/or casinghead gas.

The tax hereby levied shall also attach to, and is levied on, what is known as the royalty interest; and the amount of such tax shall be a lien on such interest.

The Oklahoma Tax Commission shall have power to require any such person, firm, corporation or association engaged in mining or the production and/or purchaser of such asphalt, mineral ores aforesaid, petroleum or other crude oil or other mineral oil, natural gas and/or casinghead gas, or the owner of any royalty interest therein to furnish any additional information by it deemed to be necessary for the purpose of correctly computing the

amount of said tax; and to examine the books, records and files of such person, firm, corporation or association; and shall have power to conduct hearings and compel the attendance of witnesses, and the production of books, records and papers of any person, firm, association or corporation.

The payment of the taxes herein imposed shall be in full, and in lieu of all taxes by the State, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon producing leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper, or for petroleum or other crude oil or other mineral oil, or for natural gas and/or casinghead gas, upon the mineral rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil, or natural gas and/or casinghead gas, or any mine producing asphalt or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or other property hereinbefore in this paragraph mentioned or described; and any interest in the land, other than that herein chumerated, and oil in storage, asphalt and ores bearing minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year, shall be assessed and taxed as cother property within the taxing district in which such property is situated at the time.

No equipment, material or property shall be exempt from the payment of ad valorem tax by rea-. son of the payment of the gross production tax as: herein provided except such equipment, machinery, tools, material or property as is actually necessary and being used and in use in the production of asphalt or of ores bearing lead, zinc, jack, gold, silver or copper or of petroleum or other crude oil, or other mineral oil or of natural gas and casing-* head gas; and it is expressly declared that no ice plants, hospitals, office buildings, garages, residences, gasoline extractions or absorption plants, water systems, fuel systems, rooming houses and other buildings, nor any equipment or material used in connection therewith shall be exempt from ad valorem tax.

The State Board of Equalization, upon its own initiative, may, and upon complaint of any person who claims that he is taxed too great a rate hereunder, shall, take testimony to determine whether the taxes herein imposed are greater, or less than the general ad valorem tax for all purposes would

be on the property of such producer subject to tax ation in the district or districts where the same is situated and also the value of oil, gas, or inineral leases, or of the mining or mineral rights, the make chinery, equipment or appliances used in the actual operation of in and around any such well or mine, the value of the oil, gas, asphalt or any of the said mineral ores produced and any other element of value in lieu of which the tax herein is levied. The said board shall have power and it shall be its duty to raise or lower the rates herein imposed to conform thereto. An appeal may be had from the decision of the State Board of Equalization thereon, by any person aggrieved to the Supreme Court, in like manner and with like effect as provided by law in other appeals from said Board to said court; provided, that after such tax has been collected and. distributed, or paid without protest, no complaint with reference to rate thereof shall be heard or considered.

§ 827 [as amended by Article I, Section 2, Laws, 1947, p. 495 (68 O. S. Supp. 1947, Sec. 827)]:

Apportionment and use of proceeds of tax.—
The gross production tax provided for in this Act is hereby levied and shall be collected and apportioned as follows, to-wit:

Seventy-eight per centum (78%) of all monies collected hereunder shall be paid to the State Treasury of the State of Oklahoma to be placed in the General Revenue Fund of the State and used for

the general expenses of State government, to be paid out only upon direct appropriations of the Legislature of the State of Oklahoma.

One tenth (1/10) of the sum collected from each county whence the oil or natural gas and or casinghead gas or asphalt or of ores bearing lead, zinc, jack, gold, silver, or copper was produced shall be paid to the County Treasurer of such county, to be credited by said County Treasurer of such county to a fund of such county known as the County Highway Construction and Maintenance Fund, and shall be used for the construction and maintenance of county highways.

One-tenth (1/10) of the sum collected from each county whence the oil or natural gas and/or casinghead gas or asphalt or of ores bearing lead, zinc, jack, gold, silver, or copper, or other mineral or substance covered hereby was produced, shall be paid to the County Treasurer of such county, and by him apportioned, on average daily attendance per capita distribution basis, as certified to him by. the County Superintendent, to the school districts of the county where such pupils attend school re-v gardless of residence of such pupil; provided the majority school district makes an ad valorem tax. levy of fifteen (15) mills for the current school year, and the separate schools of the county make . an ad valorem tax levy of one and five-tenths (1.5) mills and had a legal average daily attendance of thirteen (13) or more pupils during the next preceding year. It is hereby provided that the various school districts of the counties of the State may use as a basis for arriving at the amount to be estimated the actual income received from the same source the previous fiscal year.

Two per centum (2%) of all monies collected under this Act shall be placed to the credit of the fund designated as the "Oklahoma Tax Commission Fund", to be used for the collection of revenues levied hereunder, and under prior Acts, and for the enforcement hereof. The Commission shall appoint necessary employees and incur all necessary expenses for such purposes. Upon the presentation of a claim upon itemized vouchers approved by the Oklahoma Tax Commission and upon forms required by law the State Auditorshall draw warrants therefor upon the State Treasury, and the same shall be paid out of the aforesaid Fund; and the said Fund or so much as may be necessary is hereby appropriated for the payment of salaries and expenses as above mentioned; and if at the end of any fiscal year any part of said Fund shall remain unexpended such balance shall by the State Treasurer be transferred to and become a part of the General Revenue Fund of the State.

\$833. Payment of tax on monthly basis—When tax due—When delinquent—Payment by purchaser—By producer—How casinghead gas taxed.

—The gross production tax on asphalt or of ores

bearing lead, zinc, jack, gold, silver or copper, or of petroleum oil, natural gas or casinghead gas, as provided by law, shall, after June 30, 1933, be paid on a monthly basis in accordance with this Act.

Said tax shall become due on the first day of each calendar month on all lead, zinc, jack, gold, silver or copper, petroleum oil, natural gas or casinghead gas produced in and saved during the preceding monthly period, and if the tax is not paid on or before the end of said month the same becomes due the tax shall become delinquent and shall be collected in the manner provided by law for the collection of delinquent gross production taxes.

On oil, gas or casinghead gas sold at the time of production the gross production tax thereon shall be paid by the purchaser of such products, and such purchaser shall, and is hereby authorized to deduct in making settlements with the producer and/or royalty owner, the amount of tax so paid; provided, that in the event oil on which such gross production tax becomes due is not sold at the time of production but is retained by the producer, the tax on such oil not so sold shall be paid by the producer for himself including the tax due on royalty oil not sold; provided further, that in settlement with the royalty owner such producer shall have the right to deduct the amount of such tax so paid on royalty oil or to deduct therefrom royalty oil equivalent in value at the time such fax becomes due with the amount of the tax paid. The gross production tax upon asphalt, or on ores bearing lead, zinc, jack, gold, silver or copper shall on and after. June 30, 1933, be paid by the producer for himself, including the royalty interest, provided further that in settlement with the royalty owner such producer shall have the right to deduct the amount of such tax so paid on royalty asphalt, or on ores bearing lead, zinc, jack, gold, silver or copper, or to deduct therefrom royalty asphalt, or ores bearing lead, zinc, jack, gold, silver or copper equivalent in value at the time such tax became due, to the amount of the tax paid.

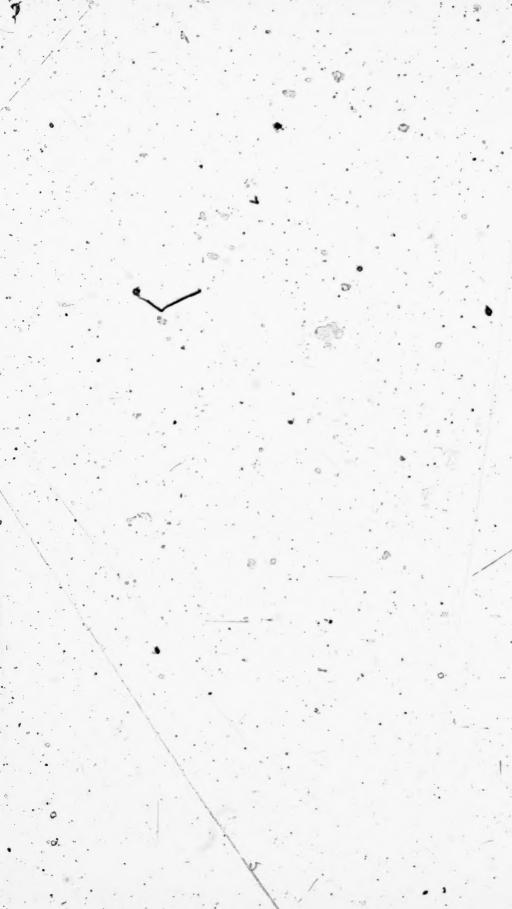
Casinghead gas when produced and utilized in any manner, except when used in the operation of the lease or premises in the production of oil or gas therefrom, or for repressing thereon, shall be considered for the purpose of this Act, as to the amount utilized, as casinghead gas actually produced and saved.

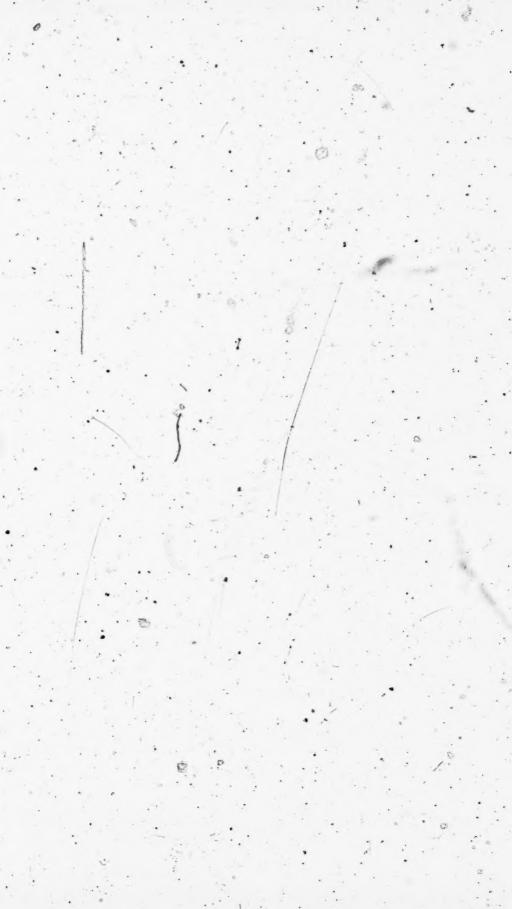
In case oil, gas or casinghead gas is sold under circumstances where the sale price does not represent the cash price thereof prevailing for oil, gas or casinghead gas of like kind, character or quality in the field from which such product is produced, the Oklahoma Tax Commission may require the said tax to be paid upon the basis of the prevailing price then being paid at the time of production thereof in said field for oil, gas or casinghead gas of like kind, quality and character.

§ 836. Lien for tax—Liability not released by provision for payment.—The tax herein referred

to shall, at all times, be and constitute a first and paramount lien against the purchaser's or producer's property as the case may be, both real and personal; and the provisions hereof, making the purchaser liable to pay such tax, and the provisions requiring the producer to pay the royalty owner's;
tax, in nowise releases the producer or purchaser
from liability to pay same, in all cases where such
tax is not paid.

§12181. Levy of tax until June 30, 1943— Amount-Report, collection and payment.-Until June 30, 1943, there is hereby levied an excise tax of one-eighth (1/8) of one cent (1¢) per barrel on each and every barrel of petroleum oil produced in the State of Oklahoma after the passage, approval and effective date of this Act. Such excise tax of one-eighth $(\frac{1}{8})$ of one cent (1e) per barrel shall be reported to and collected by the Oklahoma Tax Commission at the same time and in the same manner as is now provided by law, for the collection of gross production tax on petroleum oil. On petroleum oil sold at the time of production, the excise tax thereon shall be paid by the purchaser, who is hereby authorized to deduct in making settlement with the producer and/or royalty owner, the amount of tax so paid; provided that, in the event oil on which such tax becomes due is not sold at the time of production, but is retained by the producer, the tax on such oil not so sold shall be paid by the producer for himself, including the tax due on roy-





alty oil not sold; provided further, that in settlement with the royalty owner, such producer shall have the right to deduct the amount of tax so paid on royalty oil, or to deduct therefrom royalty oil equivalent in value at the time such tax becomes due with the amount of tax paid.

LIBRARY TO SUPREME COURT, U.S.

No. 40

In the Supreme Court of the United States

October Term, 1948.

OKLAHOMA TAX COMMISSION, Appellant,

THE TEXAS COMPANY, Appellee.

BRIEF AMICI CURIAE.

R. O. MASON,
HAYES McCOY,
Bartlesville, Okla.,
Amici Curiae.

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IN THE SUPREME COURT OF THE UNITED STATES. October Term, 1948.

No. 40

OKLAHOMA TAX COMMISSION, Appellant,

THE TEXAS COMPANY, Appellee-

BRIEF AMICI CURIAE.

The facts in this suit are undisputed. This is not an ordinary suit involving rights between persons or a person and a state. The question presented is, Does the State of Oklahoma have the power to levy the taxes here involved without the consent of the Congress of the United States?

The Congress of the United States is vested by Article I, Section 8, of the Constitution with power "to regulate commerce " " with the Indian tribes." Historically the Congress has regulated commerce with Indian tribes and members of such tribes within the United States since it was formed. The legislative, executive, and judicial branches of the United States during its history, have considered, treated and dealt with such Indian tribes as dependents and wards of the United States in a state of pupilage free from regulation or control by the states except when the Congress consents thereto.

This Court said in Cherokee Nation v. State of Georgia, 5 Peters 1, through Cliffed Justice Marshaul:

"They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage: Their relation to the United States resembles that of a ward to his guardian."

And in Cherokee Nation v. Southern Kansas Ry. Co., 135 U. S. 641, 34 L. ed. 295, said:

"From the beginning of the government to the present time, they have been treated as 'wards of the nation,' in a state of pupilage,' dependent political communities,' holding such relations to the general government that they and their country, as declared by Chief Justice Marshall in Cherokee Nation v. Georgia, 30 U.S. 5 Pet 1, 17 (8:25, 31), 'are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility'."

The power of the Government over the Indian of interest in this suit and his allotment is plenary. Article I, Section 8 of the Constitution, supra.

Lone Wolf v. Hitchcook, 18, U. S. 565:

"Plenary authority over the tribal relations of the Indians has been exercised, by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government."

United States v. Kagama, 118 U. S. 375:

"The power of the general government over these remnants of a race once powerful, now weak and dinainished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes."

The provision of the Constitution and the decisions above noted clearly show the plenary power of the Congress over the Indian of interest and his allotment and the instrumentality and agency employed by the Government in discharging its duty to said Indian. The Congress in Section 1, Act of June 16, 1906 (34 Stat. L. 267), reserved its powers with respect to Indians and property of Indians located in the State of Oklahoma, as follows:

"That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described; may adopt a constitution and become the State of Oklahoma, as hereinafter provided: Provided, that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed."

And by Section 22 of said Act required the acceptance of said Act as follows:

"That the Constitutional Convention provided for herein shall by ordinance, irrevocable, accept the terms and conditions of this Act."

Pursuant to these provisions, the Constitutional Convention in Article 25, Section 45, of the Schedule of the Constitution accepted said Act as follows:

"Be it ordained by the Constitutional Convention for the proposed State of Oklahoma; that said Constitutional Convention, do, by this ordinance irrevocable, accept the terms and conditions of an Act of the Congress of the United States, entitled, 'An act to enable the people of Oklahoma and the Indian Territory to form a Constitution and State Government and be admitted into the Union on an equal footing with the original states; and to enable the people of New Mexico and of Arizona to form a constitution and state government and be admitted into the Union on an equal footing with the original states,' approved June the sixteenth, Anno Domini, Nineteen Hundred and Six."

The appellant does not represent that the Congress has consented to the levy of such tax, but on the contrary represents that such consent is not necessary. The Congress having such plenary power, the state may not levy such tax on such instrumentality without the consent of the Congress. To hold that the state has such power independent of such consent, it will be necessary to blot out a century and a half of history and to ignore said Article I, Section 8, of the Constitution of the United States and to disregard or overrule many decisions of this Court. The freedom of such instrumentality from the tax here involved and from other taxes has been before this Court many times since the State of Oklahoma was admitted to the Union of States. This Court has uniformly held in such

cases the State of Oklahoma to be without the power to impose such tax until the Congress has consented to the levy thereof. Among the cases considered are the following: Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292; Indian Ter. Ill. O. Co. v. Oklahoma, 240 U. S. 522; Howard, etc.; v. Gypsy Oil Co., 247 U. S. 503; Large Oil Co. v. Howard, 248 U. S. 549; Jaybird Mining Co. v. Joe Weir, 271 U. S. 609; Oklahoma, ex rel., v. Barnsdall Ref., Inc., 296 U. S. 521.

In the case of Choctaw O. & G. R. Co. v. Harrison, supra, the Court said:

"It is elementary that the Federal Government in all its activities is independent of state control. This rule is broadly applied. And without congressional consent no Federal agency or instrumentality can be taxed by state authority. With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579. Johnson v. Maryland, 254 U. S. 51, 55, 65 L. ed. 126, 128, 41 Sup. Ct. Rep. 16. And see Farmers' & M. Bank v. Minnesota, 232 U. S. 516, 58 L. ed. 706, 34 Sup. Ct. Rep. 354; Choctaw, O. & G. R. Co. v. Harrison, supra; Gillespie v. Oklahoma, 257 U. S. 501, 505, 66 L. ed. 338, 340, 42 Sup. Ct. Rep. 171."

The question whether the taxes are non-discriminatory is immaterial, provided they burden the functioning of a Federal instrumentality. The question is, Has the state the power to levy any such tax, discriminatory or otherwise, without the consent of Congress? We submit that it has not because the sole power over commerce with Indians is vested by Article I, Section 8, of the Constitution, supra, in the Congress. Therefore, the power rests in the Congress whether exercised or not. The power of the Congress is not lost or vested in the state through non-exercise by the

Congress. If the Congress lost the power conferred upon it through non-exercise thereof, it would have lost before the exercise thereof much of its power that it now exercises and has exercised in the last fifty years.

The immunity from the taxes here involved is not an implied one. Article I, Section 8, of the Constitution, supra, sets Indians and their property apart from other citizens and their property, It vests the Congress with sole power over Indians and commerce with Indians. The state only has such power over Indians and commerce with Indians as it has acquired through the consent of the Congress. The Congress withheld from the State in Section 1 of the Enabling Act, supra, the power to tax Indians and the instrumentalities and agents employed by the Government in the discharge of its duty to the Indians.

The Congress is the sole arbitrator as to whether and when it will consent to the exercise by a state of the power to tax or otherwise regulate commerce with Indians. It has in many instances consented to the exercise by states of certain powers over such commerce. In Oklahoma it has consented to the partition of lands of deceased Indians, but, among others, it has withheld the power to provide the procedure for leasing for oil and gas mining purposes the restricted lands of restricted minor Indians and the right to confer the rights of majority upon minor Indians.

It has consented to the application to Osage mining leases of the tax law here involved known as the gross production tax statutes (Act of March 3, 1921, Sec. 5 of 41 Stat. L. 1249); consented to the application to Quapaw Indian mining leases of the tax law here involved known as the gross production tax statutes (Act of March 3, 1921, Section 26 of 41 Stat. L. 225); consented to the application

here involved known as the gross production tax statutes (Act of April 28, 1924, 43 Stat. L. 111); consented to the application to allotted lands of Kaw Indians of the tax law here involved known as the gross production tax statutes (Act of May 27, 1924, 43 Stat. L. 176); consented to the application to mineral leases on unallotted land on Indian Reservations other than lands of the Five Civilized Tribes and the Osage Reservation of the tax statutes to the extent that they apply to unrestricted lands; and consented to the application to the Five Civilized Tribes of Indians of Oklahoma of the tax law here involved known as the gross production tax statutes in Section 3 of the Act of May 10, 1928, 45 Stat. L. 495, and in Section 3 of the Act of February 14, 1931, 46 Stat. L. 1108.

The Congress of the United States has never consented to the levy of this tax.

• Under the admitted facts, the provision of the Constitution of the United States, supra, the provisions of the Enabling Act, supra, and the provisions of the Schedule to Oklahoma Constitution, supra, and the cases cited, the decision of the Supreme Court of Oklahoma is correct and should be affirmed.

Respectfully submitted,

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R. O. Mason, Hayes McCoy.

> Bartlesville, Okla., Amici Curiae.

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LIBRARY SUPREME COURT U.S.

KITTION FILED

No. 40

In the Supreme Court of the United States

October Term, 1948.

OKLAHOMA TAX COMMISSION, Petitioner,

THE TEXAS COMPANY, Respondent.

MOTION OF R. O. MASON AND HAYES McCOY FOR PERMISSION TO FILE SECOND BRIEF AMICI CURIAE, AND SECOND BRIEF AMICI CURIAE.

R. O. MASON, HAYES McCOY,

Bartlesville, Oklahoma,

Amici Curiae.

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IN THE SUPREME COURT OF THE UNITED STATES. October Term, 1948.

No: 40

OKLAHOMA TAX COMMISSION, Petitioner,

THE TEXAS COMPANY, Respondent.

MOTION OF R. O. MASON AND HAYES McCOY FOR PERMISSION TO FILE SECOND BRIEF AMICI CURIAE.

Come now R. O. Mason and Hayes McCoy and move the Court for an order permitting them to file a Second Brief Amici Curiat, and as grounds therefor, show the Court that the attorney for the petitioner in its reply brief filed herein takes the position that the Congress has no power under Article I, Section 8, of the Constitution to control the leasing for oil and gas mining purposes of the lands of the Indian of interest, and the development, production, and operation under such a lease on the ground the Congress only has power to regulate commerce with Indian tribes and not with individual members of Indian tribes.

R. O. MASON,

Both of Bartlesville, Okla., Amici Curiae.

IN THE SUPREME COURT OF THE UNITED STATES. October Term, 1948.

No. 40

OKLAHOMA TAX COMMISSION, Petitioner,

THE TEXAS COMPANY, Respondent.

SECOND BRIEF AMICI CURIAE.

The question for decision in this suit is, Does the State of Oklahoma have the power to levy the taxes here involved without the consent of the Congress of the United States?

The Congress is vested by Article I, Section S, of the Contitution with power to regulate commerce with Indian tribes. The word "commerce" is not defined in the Constitution. This Court in Gibbons v. Ogden, 22 U. S. 189, 6 L. ed. 23, said:

"Commerce, undoubtedly, is traffic, but it is something more; it is intercourse."

The Congress and the judiciary ever since they commenced functioning have ascribed to the word "commerce," with respect to Indian tribes, a meaning embracing all intercourse with Indian tribes and with members of Indian tribes. The Congress under such power ever since it commenced functioning has dealt with Indian tribes and individual members of such tribes as wards of the government.

It has controlled, and now controls, the restricted lands of restricted Indians and the right of such Indians to sell such land or to encumber the same by lease for grazing and agricultural purposes and by lease for mining purposes or otherwise. The Secretary of the Interior under the power conferred by the Congress supervised the leasing for oil and gas purposes of the land of the Indian of interest in this suit, and now supervises the development and operation under such lease. This Court in Childers, etc., v. John Beaver, et al., 270 S. C. 555, 70 L. ed. 730, said:

"It must be accepted as established that during the trust or restrictive period Congress has power to control lands within a state which have been duly allotted to Indians by the United States and thereafter conveyed through trust or restrictive patents. This is essential to the proper discharge of their duty to a dependent people; and the means or instrumentalities utilized therein cannot be suffected to taxation by the state without assent of the Federal Government."

Not only does the Congress have the power under said Article I, Section 8, of the Constitution, to regulate the leasing for oil and gas purposes of restricted lands of restricted. Indians and the development, production, and operation under such leases and the power to regulate Indian tribes, control tribal lands, allot lands to tribal members, impose restrictions against the sale or encumbrance of allotted lands and free tribal lands and allotted lands from taxation by the states, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territories subsequently acquired, and whether within or with-

out the limits of a state. United States v. Kagama, 118 U. S. 375, 30 L. ed. 228; United States v. Sandoval, 231 U. S. 28.58 L. ed. 107. The following acts are a few instances of the exercise of such power: The Act of February 8, 1887, being the General Allotment Act, 24 Stats. .L. 388; the Act of June 28, 1898, providing for the allotment of the lands of Choctaw and Chickasaw Indians in Indian Territory, 30 Stats. L. 493; the Act of July 1, 1898, being an act to ratify the agreement between the Dawes Commission and the Seminole Nation of Indians, 30 Stats. L. 567; the Act of March 1, 1901, being an act to ratify and confirm an agreement with the Muskogee or Creek Tribe of Indians and for other purposes, 31 Stats. L. 861; the Act of July 1, 1902, being an act to provide for the allotment of the lands of the Cherokee Nation for the disposition of townsites the ein and for other purposes, 32 Stats. L. 716; the Act of June 28, 1906, being an act for the division of the lands and funds of the Osage Indians in Oklahoma Territory and for other purposes, 34 Stats. L. 539. Each of these acts provides for the allotment in severalty of the lands of the tribe to which they apply to the members of the tribe, provides restrictions against alienation and provides freedom from taxes. The Act of May 27, 1908, being an act for the removal of restrictions from a part of the lands of allottees of the Five Civilized Tribes and for other purposes, 35 Stats. L. 312. This act, among other things, provides:

or other mining purposes, leases of restricted homesteads for more than one year and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: The Act of March 3, 1921, being an act to amend Section 3 of the Act of Congress of June 28, 1906, entitled, "An Act for the division of the lands and funds of Osage Indians in_Oklahoma, and for other purposes." 41 Stats. E. 1249. This act, among other things, provides:

"That from and after the passage of this act the Secretary of the Interior shall cause to be paid at the end of each fiscal quarter to each adult member of the Osage tribe having a certificate of competency his or her pro rata share, either as a member of the tribe or heir of a deceased member, of the interest on trust funds, the bonus received from the sale of leases, and the royalties received during the previous fiscal quarter, and so long as the income is sufficient to pay to the adult members of said tribe not having a certificate of competency \$1,000 quarterly except where incompetent adult members have legal guardians, in-which case the income of such incompetents shall be paid to their legal guardians, """

and the Act of February 27, 1925, being "An Act to amend the Act of Congress of March 3, 1921, entitled, 'An Act to amend Section 3 of the Act of Congress of June 28, 1906, entitled, "An Act of Congress for division of lands and funds of the Osage Indians in Oklahoma, and for other purposes"." This act, among other things, provides:

"No guardian shall be appointed except on the written application or approval of the Secretary of the Interior for the estate of a member of the Osage Tribe of Indians who does not have a certificate of competency or who is of one-half or more Indian blood. All moneys now in the possession or control of legal guardians heretofore paid to them in excess of \$4,000 per annum each for adults and \$2,000 each for minors under the Act of Congress of March 3, 1921, relating to the Osage Tribe of Indians, shall be returned by such

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guardians to the Secretary of the Interior, and all property, bonds, securities, and stock purchased, or investments made by such guardians out of said moneys paid them shall be delivered to the Secretary of the Interior by them, to be held by him of disposed of by him as he shall deem to be for the best interest of the members to whom the same belongs."

Such power of the Congress has seldom been questioned since the government was formed. The members of the Bar have generally conceded such power and the courts have sustained it. Very few, if any, sessions of the Congress are held without the Congress eracting some law with respect to some Indian tribe and with respect to members of some Indian tribe.

The State of Oklahoma is without power to supervise or control the development, production, and operation under the lease presented in this suit. It has never done so. The officials and employees of the United States charged with the duty of supervising and controlling the development, production, and operation under this lease have cooperated with the Corporation Commission of the State of Oklahoma, the agency of the state empowered to supervise and control the development, production, and operations under unrestricted oil and gas leases. The Congress recognizing the lack of power of the State of Oklahoma to grant its Corporation Commission, or any other official or agency, authority to control the development, production and operation under restricted Indian leases of members of the Five Civilized Tribes and desiring to consent to the application thereto of the laws of the State of Cklahoma and of the orders, rules, and regulations promulgated by said Commission, in the Eightieth Congress, First Session, on the conditions provided, consented to such application.

Public Law 336 (H. R. 3173), approved August 4, 1947, Section 11 of which act is as follows:

"All restricted lands of the Five Civilized Tribes are hereby made subject to all oil and gas conservation. it is soft Oklahoma: Provided, That no order of the Corporation Commission affecting restricted Indian dand is ball be valid as to such land until submitted to and approved by the Secretary of the Interior or his duly authorized representative."

The current Conservation Law of Oklahoma, Title 52, Chap. 3a, of Session Laws of Oklahoma 1947, Section 1, Subsection (a) in part provides:

"To prevent or to assist in preventing the various types of waste of oil or gas prohibited by statute, or any of said wastes, or to protect or assist in protecting the correlative rights of interested parties, the Commission, upon a proper application and notice given as hereinafter provided, and after a hearing as provided in said notice, shall have the power to establish well spacing and drilling units of specified and approximately uniform size and shape covering any common source of supply, or prospective common source of supply, or oil or gas within the State of Oklahoma. Such order establishing well spacing or drilling units for a common source of supply may be entered after a hearing upon the petition of any person owning an interest in the minerals in lands embraced within such common source of supply, or the right to drill a well for oil or gas on the lands embraced within such common source of supply, or on the petition of the Conservation Officer of the State of Oklahoma.",

in Paragraph (b) Subsection (1), second paragraph, in part provides:

"The order establishing such spacing or drilling units shall set forth: (1) the outside boundaries of the surface area included in such order; (2) the size, form,

and shape of the spacing or drilling units so established;
(3) the drilling pattern for the area, which shall be uniform; and (4) the location of the permitted well an each such spacing or drilling unit.";

and in Subsection (d) of said section in part provides:

"The drilling of any well or wells into any common source of supply for the purpose of producing oil or gas therefrom, after a spacing order has been entered by the Commission covering such common source of supply, at a location other than that fixed by said order is hereby prohibited. The drilling of any well or wells into a common source of supply, covered by a pending spacing application, at a location other than that approved by a special order of the Commission authorizing the drilling of such well, is hereby prohibited. The operation of any well drilled in violation of any spacing so entered is also hereby prohibited. When two (2) or more separately owned tracts of land are embraced within an established spacing unit, or where there are undivided interests separately owned, or both such separately owned tracts and undivided interests embraced within such established spacing unit, the owners thereof may validly pool their interests and develop their lands as a unit. Where, however, such owners have not agreed to pool their interests, and where one such separate owner has drilled or proposes to drill a well en said unit to the common source of supply, the Commission, to avoid the drilling of nnecessary wells, or to protect correlative rights, shall, upon a proper application therefor and a hearing thereon, require such owners to pool and develop their lands in the spacing unit as a unit."

and further, in the last paragraph of said Section 1, in part provides as follows:

"In the event a producing well, or wells, are completed upon a unit where there are, or may thereafter be, two (2) or more separately owned tracts, any royalty owner or group of royalty owners holding the royalty interest under a separately owned tract included in such spacing unit shall share in the one-eighth (1/8) of all production from the well or wells drilled within othe unit, or in the gas well rental provided for in the lease covering such separately owned tract or interest in lieu of the customary fixed royalty, in the proportion that the acreage of their separately owned tract or interest bears to the entire acreage of the unit; * * *."

It is not unusual for a spacing or drilling unit to contain restricted land of a restricted Indian and unrestricted land of a non-Indian. Apart from said Act of Congress of August 4, 1947, there is no power to compel a restricted Indian as to his restricted land in a spacing or drilling unit to pool the royalty under his lease with the royalty under another Indian lease or with the royalty under a non-restricted lease in such spacing or drilling unit. If he should decline to do so, the lessees in the respective leases are stymied in that they have no authority to pool the royalty, and the owner of the unrestricted lease, if he drills, violates such law and subjects himself to the penalties therein provided. In instances where the restricted Indian enters into an agreement with the royalty owners under another restricted lease or an unrestricted lease pooling the royalty under such leases each such agreement requires the approval of the Secretary of the Interior. The Act of August 4, 1947, eliminates the necessity for such agreements and " such approval as to the Five Civilized Tribes where said Corporation Commission has made a spacing order and the Secretary of the Interior has approved such order.

The quotation from the last paragraph of said Section 1 and any orders made by the Corporation Commission cannot operate on the lease presented in this case or on any lease of any member of any wild tribe. The Congress has never

The Congress only can permit such operation and it has not consented thereto. Said provisions and the other provisions of the Conservation Law and the orders of the Corporation Commission thereunder have no application to restricted leases of restricted members of the Five Civilized Tribes until the Secretary of the Interior approves such orders.

The Congress has plenary power over commerce with the Indians. The State of Oklahoma has no power to levy the taxes here involved without the consent of the Congress. It does not represent the Congress has consented to the levy thereof.

The Congress of the United States has never consented to the levy of these taxes.

The decision of the Sopreme Court of Oklahoma in this suit is correct and should be affirmed.

Respectfully submitted,

R. O. MASON, HAYES McCov,

Both of Bartlesville, Okla., Amici Curiae.

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APR 25 1949

CHARLES ELMORE CROPLEY

IN THE SUPREME COURT OF THE UNITED STATES

No. 40

OKLAHOMA TAX COMMISSION,

Petitioner,

VERSUS

THE TEXAS COMPANY, Respondent.

REQUEST FOR LEAVE TO FILE A RESPONSE TO PETITION FOR REHEARING

and

RESPONSE TO PETITION FOR REHEARING

R. F. BARRY, Oklahoma City, Oklahoma, Augrney for Petitioner.

APRIL, 1949.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 40

OKLAHOMA TAX COMMISSION,
Petitioner,

VERSUS

THE TEXAS COMPANY,
Respondent.

REQUEST FOR LEAVE TO FILE A RESPONSE TO PETITION FOR REHEARING and RESPONSE TO PETITION FOR REHEARING

The petitioner, Oklahoma Tax Commission, respectfully requests leave of this Honorable Court to file a response herein to the petition for rehearing tendered by the respondent, The Texas Company.

RESPONSE TO PETITION FOR REHEARING

This case arose through the Oklahoma Tax Commission assessing gross production and proration taxes against the respondent for September and October, 1942. The respondent caused the taxes assessed to be paid under protest and instituted an action in the District Court of Oklahoma County, Oklahoma, to recover the taxes. From an adverse judgment of the District Court, the respondent perfected an appeal to the Supreme Court of Oklahoma. The Supreme Court reversed the judgment of the District Court and from the Supreme Court's action a writ of certiorari was allowed in this Court and on March 7, 1949, the decision of the Supreme Court was reversed.

The Texas Company, respondent in No. 40, has caused to be filed herein a motion wherein it seeks leave of this Court to file a petition for rehearing out of time. The motion was accompanied by a petition for rehearing.

In substance, the relief sought in the above referred to petition for rehearing is that the operation of the opinion rendered herein be made wholly prospective; this for the asserted reason that the decision reached in the instant case could only be reached by overruling a number of other opinions handed down by this Court and upon which opinions the respondent had relied. In answer to the contention so made, the petitioner asserts that (a) Helvering V. Mountain Producers Corp., 303 U.S. 376, handed down March 7, 1938, furnished an adequate basis for the decision reached in the instant case, and (b) under the facts in the

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instant case no injustice or hardship will be brought about by permitting the opinion to operate retroactively.

Our argument and authorities in support of the foregoing contentions will be presented under two general propositions.

PROPOSITION NO. 1

The case of Helvering v. Mountain Producers Corporation furnished an adequate basis for the decision in the instant case.

The effect of respondent's contention is that the decision reached herein could not have been reached without overruling Choctaw, O. & G. R. Co. v. Harrison, 235 U.S. 292, and some four other cases based thereon. We respectfully submit that the language of the opinion rendered herein clearly refutes the aforesaid contention. The right to impose the gross production tax here assessed finds adequate basis on two distinct grounds: (1) The tax does not directly burden and hinder a federal instrumentality; The tax is a nondiscriminatory property tax. The other tax here imposed, an excise tax of one mill on each barrel of oil produced, was considered to be an excise tax and the assessment thereof was sustained wholly on the basis that it did not directly burden respondent as a federal instrumentality. Our assertion that the Mountain Producers case furnished an adequate basis for the present decision is amply sustained by the following quotation therefrom:

"Respondents strongly urge that the Mountain Pro- ducers decision is not controlling or effective to require

reversal in these cases, since it involved a tax on net income rather than gross production and excise taxes. And they insist that a sharp line should be drawn between what they call lessees performing a governmental function and independent contractors doing work for the Government. The latter distinction is largely, if not altogether verbal, in the context of the fact situations in these cases. As for the former difference, although the Court explicitly overruled only the Gillespie and Coronado cases, the groundings of the Mountian Producers decision do not permit limiting its effects to so narrow an application.

The language last quoted above is as applicable to the present cases as it was to the Gillespie and Coronado decisions. The taxes here are nondiscriminatory. The respondents are 'private persons' who seek immunity 'for their property or gains because they are engaged in operations under a government contract or lease. The functions they perform in operating the leases are hardly more governmental in character than those performed by lessees of school lands or, indeed, by many contractors with the Government. The lessees in the Mountain Producers case stood identically with the respondents in all these respects.

"Moreover the burdens of the taxes here, if any of a character likely to interfere with respondents in carrying out the terms of their leases, are as appropriately to be judged by 'regard * * * to substance and direct effects,' and as inappropriately to be determined 'by merely theoretical conceptions of interference with the functions of government, as were those in the Mountain Producers case. * * *

Further on in the opinion, the Mountain Producers decision is again declared to be controlling in the following quoted language:

"The Mountain Producers case was not decided on narrow, merely technical or presumptive grounds. Its very foundation was a repudiation of those insubstantial bases for securing broad private tax exemptions, unjustified by actual interfering or destructive effects

upon the performance of obligations to or work for the government, state or national. The decision came as the result of experience and of observation of the constant widening of the exempting process from tax to tax to tax.

"(7) Since that decision, as we have noted, the process has been reversed in direction. True intergovernmental immunity remains for the most part. But, so far as concerns private persons claiming immunity for their ordinary business operations (even though in connection with governmental activities), no implied. constitutional immunity can rest on the merely hypothetical interferences with governmental functions here asserted to sustain exemption. In the light of the broad groundings of the Mountain Producers decision and of later decisions, we cannot say that the Gypsy Oil, Large Oil and Barnsdall Refineries decisions remain immune to the effects of the Mountain Producers decison and others which have followed it. They are out of harmony with correct principle,' as were the Gillespie and Coronado decisions and, accordingly, they should be, and they now are, overruled. This accords with the result reached in Santa Rita Oil & Gas Co. V. State . Board of Equalization, 112 Mont. 359, 116 Pac. (2d) 1012, 136 A.L.R. 757.* * :

In the decision in the instant case, the Court stated that "the high-water mark of immunity for non-Indian lessees of restricted and allotted Indian lands came in 1922 when the Gillespie decision" was handed down, and that Group-No. 1 Oil Corp. v. Bass, 283 U.S. 279, "may be taken to mark a turning point in expansion of the lessee's immunity." This Court then proceeds to refer to a number of other cases: Metcalf & Eddy v. Mitchell, 269 U.S. 514, for example, as having established tax liability on the part of governmental agencies prior to the handing down of the Mountain Producers case. In brief, as we read the opinion

the decision in the Mountain Producers case did not necessarily declare new law, and since such is true, the decision in the instant case definitely did not declare new law on the proposition that a federal instrumentality was not exempt from nondiscriminatory state taxes that did not substantially burden. In this particular the Tenth Circuit Court of Appeals in Sunray Oil Co. V. Commissioner of Internal Revenue, 147 Fed. (2d) 962, 964, certiorari denied, 325 U.S. 861, had this to say at the page indicated:

"* * * Indeed, the decision in Helvering V. Mountain Producer's Corporation, supra, was given retrospective operation in a situation not substantially different from the one here presented. Moreover, the decisions in the Coronado and Gillespie cases had been so limited by subsequent decisions of the Supreme Court, it may be doubted that even prior to the decision in Helvering V. Mountain Producers Corporation, supra, income from leases of the character here involved would have been held to be immune from federal taxation. See dissenting opinion, Mountain Producers Corporation V. Commissioner of Internal Revenue, 10 Cir., 92 Fed. (2d) 78, 81."

In the above cited case, the Sunray Oil Co. was unsuccessful in prevailing upon the Circuit Court to adjudge that the decision in the Mountain Producers case should be given prospective application; this for the reason the oil company had been assessed income taxes on income accruing to it from oil and gas produced under leases covering lands owned by the State of Oklahoma prior to the date of the Mountain Producers decision. The oil company was denied such relief.

In the Santa Rita Oil & Gas. Co, case cited in the foregoing quotation from the opinion in the instant case, the

Supreme Court of Montana held that the Mountain Producers case overruled the Gillespie and Coronado cases. "and in so doing necessarily overfuled the Choctaw and Jaybird cases and many others like them." In the conclusion so reached, this Court now concurs as reflected by the foregoing quotations. We, therefore, say that the Mountain Producers case is the decision that determined that the respondents were liable for the taxes here assessed and not the decision herein rendered: that the Mountain Producers case is the decision that brought about a change in the law and not the present opinion; that the Mountain Producers case in effect overruled the cases that respondent relied upon here and that this Court in the instant case did nothing more than expressly overrule opinions because it was found that they were in direct opposition to the Mountain Producers case. The foregoing is here decisive for the reason that there is not here involved the assessment of any tax that accrued prior to March 7, 1938. In fact, as we will hereinafter show, respondent owes no tax accruing prior to September 1, 1942. It has either paid or obtained an acquittance of all taxes accruing prior to that date. We add, that when the present case arose, the Santa Rita Oil Company case had become final; that decision was handed down on September 12, 1941.

PROPOSITION NO. 2

No injustice nor hardship will be vested upon respondent by making the opinion herein retroactive.

As before stated, the respondent's liability for payment of the taxes here involved is limited to the taxes here assessed and those accruing after such assessment. The record reflects that the taxes assessed were paid under protestand placed in suspense and such is true of all taxes accruing subsequent to the date of the last assessment. It accordingly follows that the object and purpose of the relief now sought by respondent is to require the petitioner to refund taxes paid by virtue of the proceedings had in this case. The Record reflects that the petitioner assessed gross production and proration taxes against the respondent for the months of September and October, 1942. The taxes so assessed were paid under protest, notice was given of intention to file suit to recover the taxes so paid and an action for such purpose was instituted in the District Court of Oklahoma County. As by statute provided, the taxes so paid were by petitioner placed in suspense and are now so held. Sec. 1475, Title 68, O.S. 1941, furnishes the basis for the aforesaid proceedings. In the assessment so made, neither interest nor penalty was assessed for the reason none had accrued. While the Record does not so show, for each month subsequent to October 1942, respondent caused to be paid all taxes as they accrued under protest. The payments were placed in suspense and are now so held. The respondent has never paid any monies as either interest or penalty, nor does it contend that it has

done so. While the Record does not show the taxes accruing after October, 1942, had been paid, the provisions of Sec. 1475, supra, show that respondent could have done those things that we say it did.

The Record contains but little of the facts bearing upon the proposition of law presented under respondent's petition for rehearing; this for the reason that petitioner at no time anticipated that this law issue would be raised. It is for these reasons that we feel justified in going outside the Record in order to present in a general way the facts relating to the issue under discussion. We wish to point out that the respondent is fully advised of all of the facts herein referred to and has a copy of all written instruments herein referred to, except the opinion rendered by the Legal Division of the Oklahoma Tax Commission.

After the opinion in the Mountain Producers case had been handed down and on May 25, 1938, Mr. Cund, General Counsel for the Oklahoma Tax Commission, prepared a legal opinion in connection with the effect of that decision on the tax liability of lessees producing oil and gas from the restricted lands of Indians. The opinion was addressed to the attention of the Oklahoma Tax Commission and forms a part of the permanent records of that Commission. In speaking of the theory that existed prior to the Mountain Producers case and under which federal instrumentalities had been exempted from nondiscriminatory state taxes, the author of the opinion had this to say:

"This theory is exploded by the decision in the Mountain Producers' case. It now appears that the

lessee's interest in the oil and gas produced from restricted Indian land is now and probably at all times since we have had a gross production tax has been subject to the payment of gross production tax. * * *'

After the above referred to opinion had been promulgated, the petitioner prevailed upon the several Assees producing oil and gas under departmental leases to pay gross production and proration taxes. This is reflected by letters under date of September 29, 1939, and July 16, 1941, photostatic copies of which appear in the Appendix hereto. The matter of determining the tax liability of the numerous lessees entailed a great deal of work and it was not until 1941, that proposed assessments of taxes were made against the lessees: The proposed assessments were considered by the Oklahoma Tax Commission on June 10, 1942, on which date an agreement was reached by the terms of which a formal order was made and entered sustaining the proposed assessment of taxes from the date of the Mountain Producers case, March 7, 1938, to June 30, 1941. It seems that a gentlemen's agreement was reached at that time to the effect that the lessees would pay all taxes that accrued from the date of the assessment to the date of the hearing, June 10, 1942. As by applicable statute provided, the aforesaid order of the Oklahoma Tax Commission was formally approved by the District Court of Oklahoma County, in connection with the tax liability of respondent that accrued prior to June 30, 1941, there had accrued \$33,-175.55 as gross production taxes and proration taxes in . the amount of \$2.32. These figures do not include interest

or penalty that accrued. As a result of granting an acquittance of all taxes that accrued prior to March X, 1938. the respondent was assessed and did pay as gross production taxes the sum of \$106.22 and as proration taxes the sum of \$.32, which amounts represented taxes accruing from March 7, 1938, to June 30, 1941. The Texas Company, as aforesaid, thereafter paid all taxes as they accrued up to the close of August 1942, which means that for the months of July and August, 1942, it voluntarily paid the tax.

The foregoing facts reflect that the parties hereto originally considered that the Mountain Producers case probably settled the matter of respondent's liability for gross production and proration taxes. The District Court of Oklahoma County so believed and accordingly found, which finding and decision was sustained by the opinion rendered herein. The foregoing facts further reflect that the Oklahoma Tax Commission was willing and did treat the Mountain Producers case as not being retroactive, and it is to be presumed that it did so because to otherwise treat the case would force the imposing of interest and penalties on the respondent and other lessees similarly cituated. This situation does not obtain here for the reason that no interest and penalty was assessed and none has accrued.

The author at Page 534, Sec. 130 of 14 Am. Jur. states as a general rule of law that a decision of a court of supreme jurisdiction overruling a former decision, is retroactive in "its operation. The author points out that the courts have long recognized an exception to the general rule, which ex-

be permitted to be destroyed by decisions declaring the law to be other than what it was declared to be when the property or contract rights came into being. The respondent does not come within this exception for the reason that none of its property or contract rights can be destroyed or impaired by making the decision in the instant case retroactive. In speaking of what constitutes a property right that will be protected upon prior opinions being overruled, the Supreme Court of Oklahoma in Teague V. Smith, 85 Okla. 12, 16, 204 Pac. 439, had this to say:

"A rule of property is an equitable rule under which honest investments have been made upon the assumption that a court of last resort has established their title, and should be invoked only to protect such investments," * * * It needs no citations of authorities to sustain the rule that no one can have a vested interest to inherit the lands of decedent. The Legislature may change the law of descent and distribution at will. The doctrine of stare decisis has no application in this cause."

The law is well settled that no one has a vested right in the matter of his property remaining free from taxes or that his property be taxed at the rate prevailing as of the date of acquisition or that the method or manner of collecting taxes remain static. 16 C.J.S., pp. 663, 664, Sec. 240.

There has gradually evolved another exception to the rule that the operation of a decision overruling prior decisions will not be given retroactive effect — where to do so would work unusual hardships on persons who had relied upon the opinion, or opinions, that were overruled. In speaking of the exception so recognized by some of the

courts, the author at Page 346 of 14 Am. Jur., observes that while there is high authority for the proposition that the only exception to the rule that a decision overruling prior decisions will be given retroactive operation is where either vested property rights or contract rights are involved. some courts "in cases of unusual hardships" have extended the exception. The respondent contends that the Supreme Court of Oklahoma has recognized and follows the last exception above referred to. Generally speaking, this is true, but the Supreme Court of Oklahoma has only applied the exception in these cases where extraordinary hardships would be visited upon parties by declaring the law to be other than what it had formerly been declared to be. The respondent relies upon the case of Oklahoma County V. Queen City Lodge, 195 Okla. 131, 156 Pac. (2d) 340. The facts in that case were in substance these: The taxing officials of Oklahoma County caused certain real estate. owned by Queen City Lodge to be placed on the ad valorem tax rolls. The Lodge promptly filed an action in the District Court seeking to have the property stricken from the tax rolls for the reason that it was a benevolent institution and as such, its property was exempt from ad valorem taxes under the Constitution of the State of Oklahoma; that the Supreme Court of the State of Oklahoma had so held. In this contention, the District Court concurred and accor . ingly rendered judgment striking the property from the tax. rolls. No taxes were paid. An appeal followed to the Supreme Court and there the decision of the District Court was reversed. The Supreme Court held in substance that

mere ownership of property in a benevolent institution did not spell exemption from taxes and that before the property would be exempt from taxes, it must be used by the institution for benevolent purposes. This decision was contrary to prior decisions and such contrary decisions were overruled. It is true that the court held that the Queen City Lodge decision should have prospective operation only, but the court so held because "* * * To require payment now with the heavy interest and penalties attached would work extraordinary hardship in a great number of cases, and in many cases would result in financial ruin." The above does not obtain in the instant case since no interest nor penalty has accrued on the taxes that respondent owes Oklahoma. All taxes have been paid and are now held in suspense by the petitioner, which statement is true of all other oil companies that the opinion herein will affect. And not only is there here no possibility of any interested taxpayer facing financial ruin, no hardship will be worked on them by making the opinion herein operate retroactively. It is to be remembered that the District Court of Oklahoma County sustained Oklahoma's right to tax in January, 1945, and that the opinion here in practical operation affirms the decision of that court.

The respondent cites Yarbrough v. Oklahoma Tax Commission, 193 Pac. (2d) 1017, 344 U.S. 717, as here supporting its contention. In that case the Supreme Court of Oklahoma held that an Oklahoma estate tax could be imposed on the estates of restricted Osage Indians. The decision was contrary to the decision in Childers v. Pope, 119

Okla. 300, which decision was expressly overruled. The Oklahoma Supreme Court was of the opinion that the Mountain Producers case, Oklahoma Tax Commission V. U. S., 319 U.S. 598, and certain other cases handed down by this Court required a departure from the rule of law announced in Childers v. Pope. In the Yarbrough case, as here, taxes had been assessed, paid under protest and placed in suspense. The Supreme Court of Oklahoma did not require a refunding of the tax assessed nor did this Court on appeal. The Okiahoma Supreme Court merely held that the opinion should not be permitted to operate in such a manner as to upset titles that had vested in reliance upon Childers v. Pope. The reason for not making the opinion fully retroactive was that it was a matter of common knowledge that many Osage estates had been closed and the properties thereof had passed into the hands of third persons who had relied upon Childers v. Pope and that the opinion should no operate so as to destroy such titles. The foregoing statement is amply supported by the following quotation taken from the body of the opinion:

of our former decision, following Childers V. Beaver, was established in 1926, and under that rule of non-liability of such estates to the tax here involved, it is a matter of common knowledge, as well as judicial knowledge that many estates have been administered upon and closed and titles vested with no thought that any such tax liability existed and without any demands for or effort to collect such a tax; and that the stability of titles might be grievously affected unless we set at rest, or permit to remain at rest, any question as to the liability of any such estates for any such tax. It is suggested on the part of the Tax Commission that no

intention exists to undertake to surmount the apparent difficulties and to seek to apply this rule of taxability to such estates heretofore closed. We fully agree with the thought that no such effort should be made, and to that end, and for the reasons stated, we deem it our duty, and clearly within our authority, to give the aforesaid prospective effect only to this change in such rule. See Oklahoma County V. Queen City Lodge No. 197, I. O. O. F., 195 Okla. 131, 156 Pac. (2d) 340, and the many authorities thetein cited."

We wish to point out that the Oklahoma Tax Commission acquiesced in not making the opinion in the Yar-brough and West cases fully retroactive. In the instant case, and as before pointed out, the Oklahoma Tax Commission long ago agreed that no tax here involved should be assessed prior to the date the Mountain Producers case was handed down We believe that it is significant that the respondent here has not undertaken to show where it or lessess similarly situated will suffer a hardship beyond that suffered by the estates in Yarbrough and West and they haven't so shown because it is impossible to so show.

The respondent has wholly failed to cite any authorities holding that the operation of an opinion will be made prospective under factual situations comparable with the one here presented. We are unable to find any authorities that hold that the matter of permitting taxing officials to retain taxes paid under protest, works such a hardship on a taxpayer as to justify a court in making an opinion prospective in operation. We again say that the respondent is here attempting to obtain from this Court a judgment re-

quiring the refunding of taxes paid which action on its part is to say the least, without precedent.

CONCLUSION

We respectfully Submit that the Petition for Rehearing should be denied.

Respectfully submitted,

R. F. BARRY, Oklahoma City, Oklahoma, Attorney for Petitioner.

APRIL, 1949.

J. B. CARMICHAEL, CHAIRMAN JOE D. DUNN, VICE-CHAIRMAN HUBERT L. BOLEN, NEWBER

L. E. RUBLE, SECRETARY



OKLAHOMA TAX COMMISSION

STATE OF OKLAHOMA

-DKLAHOMA CITY

Gross Production

The Texas Commany New 19180

IN RE: GROSS PRODUCTION TAX AND PRODUCING PROPERTIES OF LESSESS OF WILD TRIBE INDIAN LANDS.

Gentlemen: #

You are hereby notified that the Gross Production Division of the Oklahoms Tax Commission will collect unpaid gross production and profution taxes on the producing properties of lessess of wild Pribe Indian lands on and after March 7th, 1938, and each delinquent taxpayer is hereby requested to remit his unpaid taxes with penalties.

A statement of a proposed assessment with detailed computation of the tax and penalty from available information will be sent within a reasonable length of time to each taxpayer so failing to remit.

Yours very truly,

OKLAHOMA TAX COMMISSION

CHAIRMAN

LLL:nd

Comm. 2

PENITTANCES SHOULD SE MADE PATABLE TO THE ORIGINAMA TAE COMMISSION AND REFER TO DIVISION

September 29, 1939

The Terms Company New 2400 Tulos, Orlahoma

> IN RUS GROSS PRODUCTION TAX OF 7/8 OF TORKING INCURRED IN OIL & GAS PRODUCED FROM TILD TRIMS RESTRICTED INDIAN LANDS

Gentlement

In accordance with an opinion from our legal department, from which we givte as follows:

"The issues's interest in oil produced from restricted Indian lands is subject to the mayonat of the gross production tax, so well as the 1/8 of 1/ per barrel organities tax."

Ton are requested, as a purchaser of trude oil and/or gas, to deduct the gross production tax and the 1/5 of 1/ per barrel proration tax before making wettlement with the producer and remit the tax to the Orlahous Tax Commission at the same time and in the same manner as the gross production tax to paid on oil and gas produced from unscettisted lands, effective as of September 1, 1939, which would apply to September runs.

Thanking you for your compliance and cooperation in this matter, we are

Tours very truly, OKLAHOMA TAX CHMISSION

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SUPREME COURT, U.S.

Office - Supreme Court, U. S.

APR 25 1949

CHARLES ELMORE CROPLEY

No. 40

In the Supreme Court of the United States

October Term, 1948.

OKLAHOMA TAX COMMISSION, Petitioner,

THE TEXAS COMPANY, Respondent.

Petition for Rehearing, and Motion to Stay Mandate.

B. W. GRIFFITH,
Tulsa, Oklahoma,
Counsel for The Texas Company.

Y. A. LAND,
Tulsa, Oklahoma,
B. A. AMES,
FISHER AMES,
Oklahoma City, Oklahoma,
Of Counsel.



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IN THE SUPREME COURT OF THE UNITED STATES. October Term 1948.

No. 40

OKLAHOMA TAX COMMISSION, Petitioner,

US.

THE TEXAS COMPANY, Respondent.

PETITION FOR REHEARING, AND MOTION TO STAY MANDATE.

To the Supreme Court of the United States of America, and the Judges Thereof:

Comes now The Texas Company, the respondent in the above entitled cause, in which judgment was rendered by this Court reversing the judgment of the Supreme Court of the State of Oklahoma, said judgment of this Court being entered on the 7th day of March, 1949, and within 25 days therefrom and at the same term of Court presents for filing this its petition for a rehearing of said cause, and in support thereof respectfully shows:

I.

The Court's opinion, if adhered to, should not be given retrospective effect so as injuriously to affect rights acquired by respondent under former decisions of the Court.

Since the Court now appears committed to the rule that an oil and gas lessee under a departmental lease covering restricted Indian lands is not exempt from a state's gross production tax or proration tax, we bow to the Court's ruling. There is, however, a particular feature of this case which we think should, in order to produce a just result, require some modification or clarification of the present decision.

At the time that the departmental oil and gas leases in question were acquired it was the settled law that the operator of such leases was a governmental instrumentality, not subject to the gross production tax or to the proration tax of the State of Oklahoma. To depart from that rule it was necessary for the Court to overrule a number of its own decisions. This in effect is a recognition by the Court that under the law as it stood prior to March 7, 1949, the taxes sought to be enforced by the state were invalid. In other words, these leases were purchased and acquired, for valuable considerations, and serious obligations were presumed to be undertaken and assumed thereunder by lessee, in the light of the then existing and controlling decisions of this Court.

The lessee had a right to and did rely upon those decisions. It knew that it was subjecting itself to an extremely rigid supervision and control of the Government in the development and operation of the properties. It knew that in many respects it was, under the decisions as they then stood, even sacrificing its independence of judgment concerning certain important and expensive details in operations, to the directions of another. It knew that it was undertaking the obligations of an instrumentality of the Government in connection with the conduct of affairs on the leases, and that those obligations could be very onerous. But it also knew that under the decisions of this Court it, as such instrumentality of the Government, was entitled to be protected from certain state burdens which might other-

wise be placed upon its operations. Knowing all these things, these leases were purchased, these obligations presumably assumed and these immunities acquired, in the light of the decisions as they formerly stood. Where this occurs and thereafter the court of last resort reverses its former holding such newly declared principle of law should not be applied retrospectively so as to deprive one of valuable rights presumably acquired and intended to be conferred under the decisions of the court as they formerly stood.

The general rule that a decision of a court of last resort, overruling a former decision, is retrospective in its operation is subject to an exception, namely, that if the new rule would injuriously affect rights acquired in reliance upon the earlier decision it will (as to such rights) be applied prospectively only. This exception has been specifically recognized by the State of Oklahoma, in a decision relating to exemptions from taxation, as we shall presently show. This also discloses the fact that it is against the public policy and the announced law of Oklahoma to exact taxes upon properties in that state covering periods of time in the past, where an exemption from such taxes had been recognized under the then announced decisions.

(Emphasis in quoted passages herein is ours, unless otherwise indicated.)

II.

Since no question of Federal law remains in the case, and since the taxes involved are State taxes sought to be enforced under State Statutes, the Oklahonia law should be applied.

The gross production taxes and the proration taxes inwolved herein are claimed by the Commission to be enforceable under Oklahoma statutes. No Federal taxes are involved. The question now is, whether, when this Court reverses its former decisions so as to deny an exemption from such taxes, theretofore recognized as existing, the judgment should be applied retroactively so as to cover and include taxes in the past, or should be applied prospectively only as to future taxes.

In such a situation it is the state taxes which are at issue. And where the Supreme Court of the State has ruled upon the effect of a change in the controlling decisions, and has passed upon the question of whether such a change in the decisions of the court of last resort should be applied retrospectively, or prospectively only, as relating to state taxes, then the state's ruling represents the settled policy and the law of the state upon that proposition, and should be given effect by the Federal courts. This has been the recognized rule since the decision of this Court in Eric Railroad Company v. Tompkins, 304 U. S. 64; holding that the Federal courts will, as to matters involving questions of state law, apply the law of such states as last announced by their highest tribunals.

III.

It is the settled law of Oklahoma that where tax exemptions, recognized as existing under prevailing decisions, are swept away by a new decision reversing the former rule, such new decision will not be applied retrospectively so as to include taxes in the past, but will be limited to future taxes only.

It is clearly within the power and within the properties for any appellate court in reversing its previous line of decisions provide specifically that the new rule shall be prospective only, and shall not be applied so as injuriously to affect valuable rights acquired under its former holdings. That the rule is applicable to changes in decisions regard-

ing exemptions from taxation appears from a recent decision by the Supreme Court of Oklahoma. That court had ? formerly held that where a religious or charitable institution possessed property which it was not using for its own purposes, but from which it derived income which it did use for such religious or charitable purposes, the property was exempt from taxes under the Oklahoma Constitution. In the case of Oklahoma County v. Queen City Lodge, 195 Okl. 131, 156 P. (2d) 340, this rule was reversed, the court holding such property taxable. However, in reaching this result the Oklahoma court said that it could, and would, give to its changed holding a prospective application only, since to do otherwise might work hardship and injustice. The court in an able opinion by Justice Welch discusses at considerable length the entire subject-matter, in fact so completely that we feel that we could not better present this phase of the case than by quoting from the opinion. References to page numbers are to the official reports. After its announcement that the levy of taxes was legal, despite former holdings to the contrary, the court on pages 145-147 says:

'The pronouncement of this rule and the overruling of the three decisions above referred to constitutes a definite change in the construction of an important provision of our Constitution. The result is that under this decision property will be taxable which under the former construction was not taxable. We are aware that such change in construction of our constitutional provision would visit great hardship in many instances unless protection is given property owners as against taxes for back years, which might naturally be thought now to have accrued during the past 37 years since statehood.

"Though property owners are likely not possessed of vested property or contract rights in tax exemptions as allowed by our Constitution, it is of course obvious that many property owners have omitted to pay taxes for many years in reliance upon our former opinions. To require payment now with the heavy interest and penalties attached would work extraordinary hardship in a great number of cases, and in many cases would result in financial ruin.

"We think it worth while herein to note some of the authorities supporting the rule affecting protection of property, contract, and other rights, in the discretion of the court. In 21 C. J. S., p. 327, Sec. 194, after stating the general rule, the following appears:

may expressly define and declare the effect of a decision overruling a former decision, as to whether or not it shall be retroactive, or operate prospectively only, and may, by a saving clause in the overruling decision, preserve all rights accrued under the previous decision.

"And again, page 329, same text, the following:

'The foregoing general rule as to an overruling decision having a retroactive effect is subject to the well-settled exception that the construction of the law, as given by the overruling decision, may work prospectively but will not be permitted to retroact so as to impair the obligations of contracts entered into, or injuriously affect vested rights acquired, in reliance on the earlier decision, as where contracts are made or rights acquired in reliance on the construction of a constitutional provision or statute by an earlier decision, which construction is afterward changed by an overruling decision, and this rule has been held to apply to the construction of taxation statutes.

"In Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 53 S. Ct. 145, reproduced with noise in 85 A. L. R. 254, Mr. Justice Cardozo speaking for the U. S. Supreme Court on the question of the

right of a court to give prospective effect only to its overruling decisions, says:

to make its ruling retroactive, and the novel stand is taken that the Constitution of the United States is infringed by the refusal.

'We think the Federal Constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are cases intimating, too broadly (cf. Tidal Oil Co. v. Flanagan, 263 U.S. 444, 68 L. ed. 382, 44 S. Ct. 197, supra), that it must give them that effect; but never has doubt been expressed that it may so treat them if it pleases, whenever injustice or hardship will thereby be averted. *** '' (Here the opinion cites numerous authorities.)''

The Oklahoma court then quotes from the Missouri case of State v. Haid, 327 Mo. 567, 38 S. W. (2d) 44, and we copy a portion of the quoted passage as follows:

"Consequently, the courts have established and adopted the rule that, where a statute or law has received a given construction by a court of last resort, the rights, positions, and course of action of parties who have acted in conformity with, and in reliance upon, such construction of the statute, are not in any wise impaired or disturbed by reason of a change in the construction of the same statute made by a subsequent decision of the court of last resort, in overruling its former decision, and the effect of the change in judicial construction is that it operates prospectively, and not retrospectively, in the same manner as though the statute or law had been amended by the Legislature."

Here we might remark that the same impelling reasons should give only prospective effect to a changed construction of the Constitution as those applicable to a statute.

The Oklahoma court then proceeded with the consideration of a number of well reasoned decisions from other jurisdictions, including the United States Supreme Court, and a decision by Mr. Chief Justice Vinson while he was Associate Justice of the United States Court of Appeals for the District of Columbia. The following is taken from the Oklahoma opinion, pages 148.150:

"In Payne v. City of Covington, 276 Ky. 380, 123 S. W. (2d) 1045, 122 A. L. R. 321, the Kentucky Court of Appeals held that a court, in overruling a prior adopted principle established by its own earlier decisions, may preserve in the overruling opinion all rights accrued under the prior declaration the same as if they had been created or arose out of a former existing statute later repealed by the Legislature. And that court disposed of the case on appeal by affirming because of the withholding of any retroactive effect of the present opinion overruling prior opinions."

Quoting from the Kentucky case:

We conceive, however, it to be competent for a court, in overruling a prior adopted principle, to preserve in the overruling opinion all rights accrued under the prior declaration, the same as if they had been created or arose out of a former existing statute which was later repealed by the Legislature. (Here the opinion cites numerous authorities.)

"Therefore, in overruling our prior opinions and in declaring our disapproval of such erroneous interpretations herein dealt with, we do so with the express reservation that all rights heretofore created and accrued in favor of all persons interested in any manner

whatsoever, shall be preserved and the principles of this opinion will not apply to any transactions begun or in the course of completion, or finished before this opinion becomes final. * * As a consequence of the conclusions we have reached, the opinions in the cases of City of Providence v. Providence Electric Light Co., supra; Overall v. City of Maidsonville, 125 Ky. 684, 102 S. W. 278, 31 Ky. Law Rep. 278, 12 L. R. A. (NS) 433; Carter v. Krueger & Son, 175 Ky. 399, 194 S. W. 553, and all other following the interpretations therein made, are hereby expressly overruled; but with the reservation, supra, whereby the rights of all parties are preserved, and this opinion shall have a prospective effect only.

"However, the withholding of any retroactive effect of this opinion requires an affirmance of the judgment, since compliance is shown with the erroneous interpretations heretofque made. Wherefore, the judgment of the lower court is affirmed'."

The Oklahoma court then proceeded:

"In Warring v. Colpogs, 122 F. (2d) 642, 136 A. L. R. 1025, Mr. Associate Justice Vinson, delivering the opinion of the United States Circuit Court of Appeals for the District of Columbia, in discussing the effect and operation of overruling opinions, says:

'When a case is decided it is expected that people will make their behavior conform to the rule it lays down and also the principle expressed in so far as it can be determined. This is true whether the decision is regarded as "the law," "the best evidence of the law," or "a prediction of what the court will do next time." When hard cases arise under the principle, counter principles are emphasized, distinctions pointed out, and the determination of what is significant may become easier or more difficult. If, at last, the first decision is overruled, then there is new law, better evidence.

or an enlightened basis for prediction. Those transactions which occurred between the two decisions, are, for the most part, accepted history. This is trugeven though a person had presented, in proper fashion, his case to the courts. His rights being finally determined, an attempt to reopen the question, in view of the new enlightenment, would be greeted with the powerful answer of res judicata. In one respect the new law is applied to an old set of facts. Traditionally, he who questioned the law or the best evidence of it is given the benefit of the new law or the better evidence of it. This is not always the case. There has arisen, for example, when contract rights or property rights growing out of contracts are involved, the exception that the one who argues against the established law is not given the benefit of the change he helped bring about inasmuch as his adversary relied upon the previous law. Such decisions apply the old law to the case at hand while establishing new law for the fature.

In concluding this phase of the case the Oklahoma court said:

"Upon consideration of all of the foregoing we conclude that the definite duty is upon us to give to this opinion prospective effect only and to rule that the operation of this change in constitutional construction and of this overruling of prior decisions shall be prospective only so as to permit taxation of all properties affected by this rule only in the future without assessment thereof for any back taxes for prior years: And it is so adjudged as to this property and as to all other properties affected by the rule made effective by this change."

The Oklahoma Supreme Court has re-affirmed the doctrine of the Queen City Ladge case in holding that where the court had reversed its former decisions so as to make property taxable, theretofore exempt, this would be applied prospectively only so as not to work a hardship upon those who relied upon its decisions in the past. We refer to the cases of Gibson v. Phillips University, 195 Okl. 456, 158 P. (2d) 901, and Board of Equalization v. Tulsa Pythian Benevolent Ass'n, 195 Okl. 458, 158 P. (2d) 904. In the latter case the court on pages 460-461 said:

"The authorities primarily relied upon in this case. by the Association are cases which were overfuled in the Queen City Lodge case, supra. (The briefs were filed herein prior to that decision.) In that opinion we found compelling reasons to overrule these former decisions which are now relied upon by the Association, and we adhere to that conclusion overruling those prior decisions. However, in the Queen City Lodge case we also found compelling reasons to conclude that the overruling of such prior decisions amounted to a sharp change in the rule of taxable status of . uch properties; and that such overruling of prior decisions and such change of rule as to taxable status should operate prospectively only so as to make such properties sub-Ject to ad valorem taxation and assessment therefor only in future years.

"And while we here follow the conclusions of overruling such prior decisions, we also adhere to the rule of the *Queen City Lodge* case in here making such rule to apply prospectively only.

the authority and ought to make this rule retroactive for recent prior years so as to subject such properties to taxation during the period of present contest and to assessment for taxation for the present year of 1945, but wood not agree. That view would violate the rule of prospective operation and effect of our decision. That view was definitely and fully considered and disapproved in our determination of the Queen City Lodge case. We there made full and unrestricted application

of the rule by which the decision would operate and be effective prospectively only, thus making such properties first assessable and taxable in and for the year 1946."

It will be noted that these Oklahoma decisions were rendered in the year 1945, and that having due regard for its pronouncement that they should not be applied retrospectively the taxes were held to be enforceable only covering the period subsequent to the time of the rendition of the decisions reversing former holdings.

In each of the last two cases cited, the Oklahoma court in referring to its Queen City Lodge case, says:

"We there made full and unrestricted application of the rule by which the decision would operate and be effective prospectively only, thus naking such properties first assessable and taxable in and for the year 1946."

In at least two more recent cases, decided in the years 1947 and 1948, the Oklahoma Supreme Court refused to give retroactive effect to a change in its decisions relating to taxes. In Duhame v. State Tax Commission, (Okla.) 179 P. (2d) 252, the Oklahoma court confined its change in tuling relative to sales taxes to future taxes only; and in Yarbrough v. Oklahoma Tax Commission, (Okla.) 193 P. (2d) 1017, said court, in overruling its former decisions that estates of full blood restricted Osage Indians are exempt from estate or inheritance taxes imposed by the state, gave to its new holding prospective application only.

In Douglass v. Pike County, 101 U. S. 677, it is said:

"The true rule is to give a change of judicial construction, in respect to a statute, the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive."

The case of Jackson v. Harris, 43 F. (2d) 513, involved the construction of the Oklahoma statutes of descent as affecting estates of deceased Indians. The Supreme Court of Oklahoma had first ruled one way, and later reversed its holding. After recognizing the general rule that such decisions are ordinarily restrospective, the Tenth Circuit Court of Appeals said:

"There is a well settled exception to this general rule that, where contracts have been entered into or rights acquired upon the faith of a decision, they cannot be impaired by a change of construction made by a subsequent decision. Moore-Mansfield Co. v. Electrical I. Co., 234 U. S. 619, 623, 34 S. Ct. 941, 58 L. ed., 1503; Douglass v. County of Pike, 101 U. S. 677, 687, 25 L. ed. 968; Green County v. Conness, 109 U. S. 104, 3 S. Ct. 69, 27 L. ed. 872; New Buffalo v. Cambria I. Co., 105 U. S. 73, 26 L. ed. 1024; Nickoll v. Racine C. & S. Co., 194 Wis. 298, 216 N. W. 502, 504; Walkinson v. Wallace, 192 N. C. 156, 134 S. E. 401, 402; Hoven v. McCarthy Bros. Co., 163 Minn. 339, 204 N. W. 29; 15 C. J. 960, Sec. 358. See also, Tidal Oil Co. v. Flanagan, 263 U. S. 444, 451-452, 44 S. Ct. 197, 68 L. ed. 382."

In Florida Forest and P. Service v. Strickland, (Fla.)
18 So. (2d) 251, it is said:

"To this rule, however, there is a certain well-recognized exception that where a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and, in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation. See 14 Am. Jur., p. 345, Sec. 130; 21 C. J. S., Courts, p. 329, Sec. 194, subsec. b."

See also, Township of New Buffalo v. Cambria Iron Co., 105 U. S. 73, and numerous cases cited in the texts of Ameri-

can Jurisprudence and Corpus Juris Secundum referred to in the Strickland case above.

In order to obtain the benefit of this rule it is not necessary for one who has acquired valuable rights under the previous line of judicial decisions to prove that he has relied thereon in acquiring such rights, for reliance will be presumed.

-Bank of Philadelphia v. Posey, (Miss.) 95 So. 134; Continental Supply Co. v. Abell, (Mont.) 24 P. (2d) 133.

Other authorities might be cited to the same effect, but the above illustrate the general principle, and we refrain from adding to the length of the petition for rehearing.

IV.

Respondent has relied upon the Court's former decisions, and would be seriously and materially affected by a retrospective application of the present holding.

The amount of the taxes for the recovery of which this suit was originally brought was only \$3,931.92, being the taxes covering a two-months period in 1942. But Title 68, Oklahoma Statutes Annotated, Section 1475 (included as Appendix II to our brief) provides in substance that where suit has been brought to recover taxes claimed to be unlawful because violative of the Federal Constitution, et cetra, the taxpayer need not institute successive suits, but may later protest other like taxes awaiting the determination of the pending suit. Since that was the statute pursuant to which respondent proceeded, and since some six and one-half years have passed subsequent to the bringing of this suit, the Court can readily appreciate the fact that a substantial sum in taxes would be affected by any retrospective application of the present decision, as to which taxes

respondent was exempt under the former decisions of the court. Thus the injury which would be visited upon respondent by a retroactive application of the Court's present decision is not an imagined, but is a real and substantial one.

In view of the present holding of the Court respondent makes no claim to any future immunity from the taxes involved, under the United States Constitution, upon the ground that it is exempt therefrom as a Federal instrumentality. But by the same token we submit that manifest justice demands that this respondent be afforded that protection which, under the former decisions of this Court, it believed, and had a right to believe it enjoyed, at least up to the time of the changed ruling. That this Court has the power and that it is within its province to make its present decision prospective instead of retroactive is evident; that such application would further promote the ends of justice and would prevent a harsh and unjust result to respondent is equally manifest; and that a decision radically changing as important a principle of law as appears in the instant case should be given prospective application only, in order that all men may know what the law is and may govern themselves accordingly, seems too clear for argument.

Wherefore, the foregoing considered, it is respectfully urged that this petition for a rehearing be granted and that the court order that said present decision be given prospective application only; that an order be entered herein adjudging this respondent is ertitled to a return to it of the tax payments made under protest and involved in this litigation; and also holding that in so far as the question of tax immunity under the United States Constitution and involved in this case is concerned, this respondent should likewise be protected and held to be exempt as to any taxes.

similarly protested by it, when levied upon the production of oil from the Indian lands here involved prior to the entering of the Court's judgment herein.

In the event that the Court does not see fit to enter an order as prayed for herein, then respondent prays the Court to declare that it leaves the matter to the Supreme Court of Oklahoma to determine whether the decision of March 7, 1949, should operate restrospectively or prospectively only, as to taxes within Oklahoma.

Respondent further moves the Court to enter an order withholding its mandate in this cause until disposition is made of the petition for rehearing, for the reason that the issuance of the mandate prior to such time may work injustice and hardship upon this respondent.

Respectfully submitted, March, 1949.

B. W. GRIFFITH, Tulsa, Oklahoma,

Counsel for The Texas Company.

Y. A. LAND, Tulsa, Oklahoma,.

B. A. AMES,

FISHER AMES,

Oklahoma City, Oklahoma, Of Counsel.

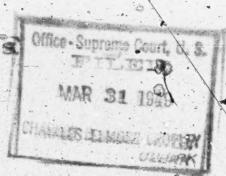
CERTIFICATE OF COUNSEL.

I, counsel for the above named respondent, The Texas Company, in cause No. 40, October Term, 1948, in the Supreme Court of the United States, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay, and that it is confined to substantial grounds available to said The Texas Company, although not previously presented, namely, that the decision herein should operate prospectively and not retrospectively.

Dated March 30, 1949.

B. W. GRIFFITH,
Tulsa, Oklahoma,
Counsel for The Texas Company.

SUPREME COURT, U.S.



No. 40

In the Supreme Court of the United Ftates

October Term, 1948.

OKLAHOMA TAX COMMISSION, Petitioner,

THE TEXAS COMPANY, Respondent.

MOTION FOR ENLARGEMENT OF TIME TO FILE PETITION FOR REHEARING.

B. W. GRIFFITH,
Tulsa, Oklahoma,
Counsel for The Texas Company.

IN THE SUPREME COURT OF THE UNITED STATES. October Term 1948.

No. 40.

OKLAHOMA TAX COMMISSION, Petitioner,

THE TEXAS COMPANY, Respondent.

MOTION FOR ENLARGEMENT OF TIME TO FILE PETITION FOR REHEARING.

Comes now The Texas Company, respondent in the above cause, and hereby shows to the Court:

- 1. That it desires to file petition for rehearing in this case, not upon the main issue presented to and decided by the Court, but upon other substantial grounds available to it, although not previously presented, that is, that the decision herein should operate prospectively only, and not retrospectively.
- 2. That it believes, and so states, that its petition for rehearing, submitted herewith, is meritorious, and should be sustained as to the single proposition therein set forth, namely, the prospective instead of the retroactive application of said decision. That the relief prayed for therein is in accordance with law, would serve the ends of justice and would prevent undue hardship upon said respondent.

- 33 had been changed so as to shorten the time allowed for filing petition for rehearing to fifteen days (subject to the Court's power to enlarge the time), until after said rifteen days had expired. That failure to ascertain that this change had been made in the Court's Rules was not due to any lack of due diligence.
- 4. That the time for the issuance of mandate herein has not expired, the mandate has not been issued, and that this Court retains jurisdiction of this case.

Wherefore, said The Texas Company prays the Court to enter an order herein enlarging the time to file its said petition for rehearing in this cause No. 40, October Term, 1948, said petition for rehearing accompanying this motion, and to permit the filing of same instanter.

Dated March 30, 1949.

B. W. GRIFFITH,
Tulsa, Oklahoma,
Counsel for The Texas Company.

